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Virginia Should Adopt Strict Tort Recovery in Products Liability

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NOTE

VIRGINIA SHOULD ADOPT STRICT TORT RECOVERY IN PRODUCTS LIABILITY SUITS INVOLVING PERSONAL INJURY

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I. INTRODUCTION*

Since World War II, revolutionary changes have overtaken the American law of products liability. Such changes have been in response to the increase in consumer injuries resulting from defects in sophisticated products mass-produced by sophisticated manufacturing processes. This has occurred during a time of increased litigiousness and general awareness of the need for consumer protection.¹ Accordingly, products liability suits have multiplied,² and the legal theories used to determine the outcome of such suits have similarly been in an era of dramatic transition. Such legal changes have significantly affected both tort and warranty law across the

* The student contributors are John P. Rowley III and Sally Y. Wood. They express their appreciation for the guidance and support of Professor Robert I. Stephenson without which this note could not have been written.

1. Emroch, *Caveat Emptor to Strict Liability: One Hundred Years of Products Liability Law*, 4 U. RICH. L. REV. 155, 155 (1970) [hereinafter cited as Emroch, *Caveat Emptor*].

2. Phillips, *A Synopsis of the Developing Law of Products Liability*, 28 DRAKE L. REV. 317, 319 (1978-79).

country. Until 1960 products liability suits were brought primarily in warranty or negligence. Today, strict tort liability has become established as a powerful legal doctrine.³

*Greenman v. Yuba Power Products, Inc.*⁴ first considered this tort theory that merely requires proof of a defect and no showing of defendant's negligence. Policy reasons such as risk spreading, consumer protection, safety incentives, enterprise liability and the balancing of utility and risk justify this doctrine's emergence.⁵ The marketing policy described by the American Law Institute best summarizes, however, the need for strict tort liability.

On whatever theory, the justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their

3. *Id.* at 335-36. In 1961, the American Law Institute submitted the first draft of 402A which limited its scope to the sale of food. (Tent. Draft No. 6, 1961). However, the laws concerning strict tort liability were changing so rapidly that in 1962, 402A was redrafted to include products for "intimate bodily use." (Tent. Draft No. 7, 1962). In 1964, this section would be redrafted to include "any product." (Tent. Draft No. 10, 1964). Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 793, n.9 (1966) [hereinafter cited as Prosser, *The Fall*]. For a discussion of strict tort liability, see Annot., 13 A.L.R.3d 1057 (1967 & Supp. 1979).

4. 59 Cal.2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962). Plaintiff's wife purchased a power tool. While plaintiff was using this tool as a lathe, a piece of wood flew from it, striking and injuring the plaintiff. In sustaining the trial court's judgment against the manufacturer, Justice Traynor emphasized that establishment of an express warranty in order to impose strict liability was unnecessary. "A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." 377 P.2d at 900, 27 Cal. Rptr. at 700. For studies of strict tort liability's historical development, see Kessler, *Products Liability*, 76 YALE L. J. 887, 895-938 (1967); Lascher, *Strict Liability in Tort for Defective Products: The Road to and Past Vandermark*, 38 S. CAL. L. REV. 30 (1965); Maleson, *Negligence Is Dead but Its Doctrines Rule Us from the Grave: A Proposal to Limit Defendants' Responsibility in Strict Products Liability Actions Without Resort to Proximate Cause*, 51 TEMP. L. Q. 1, 5-12 (1978).

5. See Green, *Strict Liability Under Sections 402A and 402B: A Decade of Litigation*, 54 TEX. L. REV. 1185, 1189-91 (1976); Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L. J. 1099, 1119-24 (1960) [hereinafter cited as Prosser, *The Assault*]; Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109, 1371-88 (1974); Speidel, *The Virginia "Anti-Privacy" Statute: Strict Products Liability Under the Uniform Commercial Code*, 51 VA. L. REV. 804, 809-13 (1965); Note, *Reforming the Law of Consumer Recovery and Enterprise Liability Through the Uniform Commercial Code*, 60 VA. L. REV. 1013, 1019-22 (1974) [hereinafter cited as *Reforming the Law*].

goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.⁶

A study of such policy concerns and of case precedent culminated⁷ in the Institute's adoption of section 402A of the Second Restatement of Torts. That section defines the seller's liability when his defective product causes harm to a user or consumer as follows:

- (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
 - (a) the seller is engaged in the business of selling such a product, and
 - (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
- (2) The rule stated in Subsection (1) applies although
 - (a) the seller has exercised all possible care in the preparation and sale of his product, and
 - (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.⁸

It was maintained that strict liability should sound in tort rather than in an implied warranty action.⁹ Additionally 402A was espoused since contractual limitations encumbered the warranty action. Of particular concern were the restrictions dealing with privity, notice and disclaimer.¹⁰ Simply expressed, "[t]he remedies of injured consumers ought not . . . to depend upon the intricacies of the law of sales."¹¹

While heralded for its legal simplicity,¹² 402A in substance is not significantly different from modern warranty law—at least in Virginia. The

6. RESTATEMENT (SECOND) OF TORTS § 402A, Comment c (1965).

7. RESTATEMENT (SECOND) OF TORTS § 402A, Comment b (1965).

8. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

9. Comment, 41 TENN. L. REV. 756, 757-58 (1974).

10. RESTATEMENT (SECOND) OF TORTS § 402A, Comment m (1965). Privity of contract restricts warranty rights to purchasers of the warranted goods. Notice bars any warranty recovery unless the warrantor is given prompt notice of the warranty breach. A disclaimer provision in a seller's standardized sales contract customarily excludes (often in small print) the implied warranty of merchantability.

11. *Ketterer v. Armour & Co.*, 200 F. 322, 323 (S.D.N.Y. 1912).

12. "Its main appeal is that it appears to be a tidier piece of legal doctrine than its predecessors." Dickerson, *The ABC's of Products Liability—With a Close Look at Section 402A and the Code*, 36 TENN. L. REV. 439, 442 (1969).

drafters of 402A did not, however, rely heavily on warranty precedent to formulate its strict tort liability principles.¹³ Moreover all 402A "does to implied warranty law is abolish the notice requirement, restrict the effectiveness of disclaimers to situations where it can be reasonably said that the consumer has freely assumed the risk, and abolish the privity requirement, where ordinary consumers are involved."¹⁴

Although 402A has not been embraced by some scholars,¹⁵ the overwhelming majority of American jurisdictions have adopted 402A,¹⁶ or some variation of its formula.¹⁷ A few states have legislatively adopted this doctrine; most jurisdictions, however, have judicially enacted 402A.¹⁸

II. REVIEW OF 402A

Illustrative of 402A's reform is its abrogation of a "privity of contract"¹⁹ requirement which was an anachronism in tort law. Section 402A applies although "the user or consumer has not bought the product from or entered into any contractual relation with the seller."²⁰ Dean Prosser noted the policy reason for this anti-privity approach. The supplier, marketing his product through packaging, advertising and the like, represents to the public that his product is serviceable and safe. Thus in reliance, the consumer purchases the product. A middleman serves only to get the product to the consumer. Therefore, when the product injures the consumer, the supplier reasonably and fairly cannot escape liability by arguing lack of

13. RESTATEMENT (SECOND) OF TORTS § 402A, Comment b (1965).

14. Seeley v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 158, 45 Cal. Rptr. 17, 30 (1965). See Prosser, *The Fall*, *supra* note 3, at 804. However, the American Law Institute did intend 402A to sound in tort and not in contract law. *Id.* at 802. Even if the word "warranty" is used in conjunction with 402A, it "must be given a new and different meaning if it is to be used in connection with this Section." RESTATEMENT (SECOND) OF TORTS § 402A, Comment m (1965).

15. See Speidel, *supra* note 5, at 804; Titus, *Restatement (Second) of Torts Section 402A and the Uniform Commercial Code*, 22 STAN. L. REV. 713 (1970).

16. As of 1978, thirty-eight states had adopted either 402A or some variation of its formula. Maleson, *supra* note 4, at 2.

17. A few courts have not required proof that the defect be "unreasonably dangerous"; some hold only the defendant-manufacturer liable; others restrict liability, in cases involving property damage, to property other than to the product itself. See, e.g., Phillips, *supra* note 2, at 336-40.

18. Of the thirty-eight states only Arkansas, Maine and South Carolina have codified 402A. *Id.* at 336, n.86.

19. Privity of Contract is defined as: "that connection or relationship which exists between two or more contracting parties. It was traditionally essential to the maintenance of an action on any contract that there should subsist such privity between the plaintiff and defendant in respect of the matter sued on." BLACK'S LAW DICTIONARY 1079 (5th ed. 1979).

20. RESTATEMENT (SECOND) OF TORTS § 402A(2)(b) (1965).

privity.²¹ The Restatement's abrogation of privity reflected developing case law that advocated such change.²²

The Restatement remained neutral as to the bystander's status.²³ A caveat of 402A noted that "[t]he Institute expresses no opinion as to whether the rules stated in this Section may not apply . . . to harm to persons other than users or consumers"²⁴ However, 402A's silence was not intended to restrict bystander recovery since "[t]he caveat articulates the essential point: once strict tort liability is accepted, bystander recovery is analytically *fait accompli*."²⁵ Thus, courts logically extended 402A to include the innocent bystander;²⁶ certainly this extension has re-

21. Prosser, *The Assault*, *supra* note 5, at 1123. For additional reasons see RESTATEMENT (SECOND) OF TORTS § 402c, Comment c (1965); Dickerson, *supra* note 12, at 445-47; Kessler, *supra* note 4, at 891-92; Project, *Article Two Warranties in Commercial Transactions*, 64 CORNELL L. REV. 30, 255-56 (1978) [hereinafter cited as *Article Two Warranties*].

22. A historical study of the privity issue begins with *Winterbottom v. Wright*, 10 M. & W. 109, 152 Eng. Rep. 402 (1842). An injured driver of a defective mail coach was unable to recover damages in warranty from the retailer because no contractual relationship existed between them. *Winterbottom* was thereafter treated as if it had been a negligence action. As such, its "doctrine" would prevail throughout the 19th century in America. See 2 R. HURSH & H. BAILEY, *AMERICAN LAW OF PRODUCTS LIABILITY* § 10:2 (2d ed. 1974). However, *Thomas v. Winchester*, 6 N.Y. 397 (1852), held privity not required in a negligence action resulting from mislabeling of something inherently dangerous: viz., a poison. Exception upon exception would erode *Winterbottom*, and its ruling was finally rejected by *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916). An automobile manufacturer's defective wheel caused plaintiff's injuries. The plaintiff was allowed to recover notwithstanding lack of privity. *MacPherson*, now universally followed, held defendant liable for negligently marketing a product which placed the consumer in danger. See R. HURSH & H. BAILEY at § 10:36; W. PROSSER, *HANDBOOK ON THE LAW OF TORTS* § 96 (4th ed. 1971).

In warranty actions, anti-privity doctrines were first held applicable only to cases involving unwholesome food and drink. See Prosser, *The Assault*, *supra* note 5, at 1103-14. However, in *Henningson v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960), the court allowed recovery against the remote manufacturer of a defective automobile as well. Therefore, the nature of the product became irrelevant. See generally 63 AM. JUR. 2D *Products Liability* § 159-72 (1972); Phillips, *supra* note 2, at 377-81.

23. The bystander, for instance, is a person who is hurt by a defective product that he neither owns nor is using. He is, for example, a person injured by the bolt that flies from the defective lawnmower or a pedestrian hit by the defective automobile that steers out of control. "His only misfortune is being in the wrong place at the wrong time, much the same as the unlucky victim of a lightning bolt." Comment, 19 KAN. L. REV. 251, 251 (1971).

24. RESTATEMENT (SECOND) OF TORTS § 402A, Caveat (1965). See RESTATEMENT (SECOND) OF TORTS § 402A, Comment o (1965).

25. Comment, 38 U. CHI. L. REV. 625, 630 (1971). *Contra*, Speidel, *supra* note 5, at 819.

26. In interpreting and expanding 402A, *Elmore v. American Motors Corp.* explained that "[c]onsumers and users, at least, have the opportunity to inspect for defects and to limit their purchases to articles manufactured by reputable manufacturers and sold by reputable retailers, whereas the bystander ordinarily has no such opportunities. In short, the bystander is in greater need of protection." 70 Cal. 2d 578, 451 P.2d 84, 89, 75 Cal. Rptr. 652, 657

flected the trend.²⁷ Since 402A lies in tort and not in contract, there is no discernable reason why anti-privity principles should extend to both the user and consumer and not the bystander.²⁸

Section 402A's liability is strict since defendant's negligence need not be proven. Defendant is liable even though he "has exercised all possible care in the preparation and sale of his product,"²⁹ and the plaintiff need not prove that the defendant "failed to exercise due care in making the defective article or in failing to discover a defective or unreasonably dangerous product."³⁰ A plaintiff's frequent inability to show negligence justifies the imposition of strict liability.³¹ Moreover, the desire to place responsibility upon manufacturers and distributors for placing defective products on the market supports this reasoning.³² A strict tort liability action thus avoids the expense of time and money normally required in a negligence action,³³ since 402A's roots are not based in negligence.³⁴

Logically, 402A eliminated the defense of contributory negligence,³⁵ and the vast majority of courts adopting section 402A have so held.³⁶ At least, "[c]ontributory negligence of the plaintiff is not a defense when such negligence consists merely of a failure to discover the defect in the product, or to guard against the possibility of its existence."³⁷ This defense is abolished since the manufacturer or distributor has affirmed his goods to be safe, and "[t]he force of this affirmation would be materially lessened if he were held to make this affirmation only to careful persons."³⁸ However, assumption of risk remains a defense in a strict tort liability suit; therefore "voluntarily and unreasonably proceeding to encounter a known dan-

(1969). Additionally, the extension is justified since the cost of consumer injuries can best be assumed by the manufacturer who passes this expense along to its purchasers. *Codling v. Paglia*, 32 N.Y.2d 330, 341, 298 N.E.2d 622, 628, 345 N.Y.S.2d 461, 463 (1973). See generally 63 AM. JUR. 2D *Products Liability* § 144 (1972).

27. *Reforming the Law*, *supra* note 5, at 1017.

28. RESTATEMENT (SECOND) OF TORTS § 402A, Comment 1 (1965).

29. RESTATEMENT (SECOND) OF TORTS § 402A(2) (1965).

30. Emroch, *Pleading and Proof in a Products Liability Case*, 3 VA. BAR A. J. 5, 8 (1977).

31. See *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436, 441 (1944); Phillips, *supra* note 2, at 337; Prosser, *The Assault*, *supra* note 5, at 1117; 63 AM. JUR. 2D *Products Liability* § 125 (1972).

32. Emroch, *Pleading and Proof*, *supra* note 30, at 8.

33. Prosser, *The Assault*, *supra* note 5, at 1116.

34. Maleson, *supra* note 4, at 5-12.

35. RESTATEMENT (SECOND) OF TORTS § 402A, Comment n (1965).

36. Seidelson, *The 402A Defendant and the Negligent Actor*, 15 DUQ. L. REV. 371, 373, n.13 (1977).

37. RESTATEMENT (SECOND) OF TORTS § 402A, Comment n (1965).

38. Lascher, *supra* note 4, at 53-54. Consequently the consumer can rely on this representation of safety. Green, *supra* note 5, at 1215.

ger" constitutes a defense.³⁹

While negligence need not be proven, the existence of a defect must be shown.⁴⁰ "Unreasonably dangerous" serves as the 402A standard for establishing a defect.⁴¹ Some jurisdictions, while otherwise adopting 402A, have not countenanced this language because it has been determined that "unreasonably" smacks too much of negligence.⁴² Certainly it is a more demanding standard than that imposed in warranty.⁴³ Because "unreasonably dangerous" affords judicial control, in proper instances the case will not reach a plaintiff-oriented jury. Importantly, once the case does reach the jury, "unreasonably dangerous" provides an easily understood standard for determining whether the product is defective.

Some courts have interpreted 402A to extend to the housing industry. Such reasoning is logical since 402A does hold the seller liable for "any product" placed on the market that is defective and causes injury.⁴⁴ When considering mass-developed housing, these courts have been unable to distinguish the house from any other mass-produced product. "Common sense tells us that a purchaser under these circumstances should have at least as much protection as the purchaser of a new car, or a gas stove, or a sump pump, or a ladder."⁴⁵ Certainly the trend is to extend 402A's coverage to mass-produced homes that result in personal injuries because they are defectively constructed.⁴⁶ "Caveat emptor" should no longer prevail,⁴⁷

39. RESTATEMENT (SECOND) OF TORTS § 402A, Comment n (1965). See generally Keeton, *Assumption of Products Risks*, 19 S.W.L.J. 61 (1965); Noel, *Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk*, 25 VAND. L. REV. 93 (1972).

40. Emroch, *Pleading and Proof*, supra note 30, at 5. See 63 AM. JUR. 2d *Products Liability* § 129 (1972).

41. Emroch, *Pleading and Proof*, supra note 30, at 13.

42. In some jurisdictions the plaintiff need not show that the product was "unreasonably dangerous." Butaud v. Suburban Marine & Sporting Goods, Inc., 543 P.2d 209, 213-14 (Alaska 1975); Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 133-35, 501 P.2d 1153, 1162-63, 104 Cal. Rptr. 433, 442-43 (1972); Glass v. Ford Motor Co., 123 N.J. Super. 599, 304 A.2d 562, 564 (1973). Azzarello v. Black Bros. Co., Inc., 480 Pa. 547, 391 A.2d 1020, 1027 (1978), found "unreasonably dangerous" misleading to the jury. In West Virginia, the test is whether the product is reasonably safe for its intended use. Morningstar v. Black & Decker Mfg. Co., — W. Va. —, 253 S.E.2d 666, 683 (1979).

43. Clark & Davis, *Beefing Up Product Warranties: A New Dimension in Consumer Protection*, 23 KAN. L. REV. 567, 599 (1975). Contra, Dickerson, supra note 12, at 443.

44. RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965). § 402A should encompass housing since "[i]t extends to any product sold in the condition, or substantially the same condition, in which it is expected to reach the ultimate user or consumer." RESTATEMENT (SECOND) OF TORTS § 402A, Comment d (1965).

45. Smith v. Old Warson Dev. Co., 479 S.W.2d 795, 799 (Mo. 1972). See, e.g., Kriegler v. Eichler Homes, Inc., 269 Cal. App. 2d 224, 74 Cal. Rptr. 749, 752 (1969).

46. Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965), serves as the forerunner of cases allowing 402A protection of mass-produced homes. Lessee of such a mass-pro-

and the previously unprotected homeowner must be afforded greater consumer protection.⁴⁸ In sporadic instances judicial decisions have expanded 402A's coverage to real estate transactions outside the area of mass-produced homes.⁴⁹ However, it is not inconceivable that 402A will afford homeowners the broad protection that has been long awaited.⁵⁰

Most importantly, 402A was founded in tort and thus escaped the contractual limitations of disclaimer and notice. Both contract limitations had been sanctioned by the Sales Act⁵¹ and the Uniform Commercial

duced home recovered against the builder-vendor under a strict liability in tort doctrine when scalding faucet water severely burned lessee's child. See Jaeger, *An Emerging Concept: Consumer Protection in Statutory Regulation, Products Liability and the Sale of New Homes*, 11 VAL. U. L. REV. 335, 343-45 (1977); Maldonado, *Builder Beware: Strict Tort Liability for Mass-Produced Housing*, 7 REAL ESTATE L. J. 283, 294-97 (1979); Rapson, *Products Liability Under Parallel Doctrines: Contrasts Between the Uniform Commercial Code and Strict Liability in Tort*, 19 RUTGERS L. REV. 692, 694-95 (1965). Berman v. Watergate West Inc., 391 A.2d 1351, 1356 (D.C. 1978), and Patitucci v. Drelich, 153 N.J. Super. 177, 379 A.2d 297, 298 (1977), have applied 402A to such real estate transactions. Imposition of strict tort liability is a definite trend. Maldonado, *supra* at 297. See generally Annot. 25 A.L.R.3d 383 (1969 & Supp. 1979).

47. Such a harsh rule should not prevail since the purchase of a home is normally the largest purchase in the consumer's life. "Caveat emptor" is anachronistic in the mass-produced housing area; today the builder-vendor and the buyer are hardly in equal bargaining positions. The buyer today is forced to rely on the seller's skills and representations. See, e.g., Bearman, *Caveat Emptor in Sales of Realty—Recent Assaults Upon the Rule*, 14 VAND. L. REV. 541 (1961); Comment, 13 U. RICH. L. REV. 381, 381-85 (1979).

48. Intricate building codes obstructed the homeowner's ability to reach the builder-vendor. Additionally warranty theories offered little homeowner-consumer protection. Maldonado, *supra* note 46, at 283. Moreover, such mass-produced homes are normally purchased by lower to middle income-bracket consumers.

49. Strict tort liability has been extended to defective home component parts. State Stove Mfg. Co. v. Hodges, — Miss. —, 189 So. 2d 113 (1966), cert. denied 386 U.S. 912 (1967). Additionally, in Avner v. Longridge Ests., 272 Cal. App. 2d 607, 77 Cal. Rptr. 633 (1969), the court held defendant liable for the improper grading of a landfill which caused a slope of the lot to collapse. Avner involved neither mass-production of homes nor industrial products. See Maldonado, *supra* note 46, at 297-98; Comment, 45 NOTRE DAME LAW. 533, 535 (1970).

50. Time will tell whether the doctrine applies to the sale of a new non-development house, or to the resale of a 'used' development house (where the developer takes a deed back from the original purchaser), or even to the sale of a 'used' non-development house (i.e., not involving any builders).

Rapson, *supra* note 46, at 695, n.15.

51. Section 71 of the Sales Act sanctioned disclaimers; Section 49 sanctioned notice requirements. Prosser, *The Assault*, *supra* note 5, at 1130-32. Disclaimers traditionally had been allowed based on freedom of contract principles. Whitford, *Strict Products Liability and the Automobile Industry: Much Ado About Nothing*, 1968 WIS. L. REV. 83, 96. Notice was required in order to prevent stale claims and to allow defendant's earliest investigation of the claim. Having been notified of injury, the defendant could remove his product from the market, thus preventing further injuries. Phillips, *supra* note 2, at 376; *Reforming the Law*, *supra* note 5, at 1034-35.

Code,⁵² but not without harsh criticism.⁵³ Section 402A emphasizes that these sales law intricacies are totally inapplicable when determining liability for a defective product that causes injury to the consumer.⁵⁴ As Dean Prosser stated:

What all of this adds up to is that "warranty," as a device for the justification of strict liability to the consumer, carries far too much luggage in the way of undesirable complications, and is leading us down a very thorny path. The courts which quote, in nearly every other case, the statement that "the remedies of injured consumers ought not to be made to depend upon the intricacies of the law of sales," have proceeded to entangle themselves in precisely those intricacies like Laocoon and his sons.⁵⁵

III. THE CASE OF THE EXPLODING LAWNMOWER REVISITED

In 1964, the General Assembly enacted Virginia's version of the Uniform Commercial Code.⁵⁶ Dean Richard Speidel, in the succeeding year,

52. Disclaimers are allowed by the Uniform Commercial Code. U.C.C. § 2-316 (1972 version). Both express warranties and implied warranties of merchantability can be disclaimed, but the disclaimer must be conspicuous. "That is to say, they cannot be disclaimed in fine print that does not fairly apprise the buyer of the risk he is running. They should be disclaimed conspicuously, in language that fairly apprises the buyer of the facts." Hawkland, *Major Changes Under the Uniform Commercial Code in the Formation and Terms of Sales Contracts*, 10 PRAC. LAW. 73, 89 (1964), quoted in Rapson, *supra* note 46, at 710. See *Article Two Warranties*, *supra* note 21, at 170-91; Whitford, *supra* note 51, at 101-02.

Notice is required by the Uniform Commercial Code. U.C.C. § 2-607(3)(a) (1972 version). See U.C.C. § 2-607, comments 4 and 5 (1972 version); *Article Two Warranties*, *supra* note 21, at 265; Rapson, *supra* note 46, at 707-09; Annot., 6 A.L.R.3d 1371 (1966 & Supp. 1979); Annot., 53 A.L.R.2d 270 (1957).

53. For instance, disclaimers are criticized because the seller retains too much power. It is unfair for the manufacturer-distributor to disclaim liability when he is best able to absorb the loss. Furthermore, in the consumer setting, freedom of contract principles are totally inapplicable; overreaching could easily characterize such transactions. See, e.g., Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective-Product Cases*, 18 STAN. L. REV. 974, at 1004-12 (1966); Phillips, *supra* note 2, at 382; Prosser, *The Assault*, *supra* note 5, at 1131-33. *Contra*, McCauley, *Private Legislation and the Duty to Read—Business Run by IBM Machine, the Law of Contracts and Credit Cards*, 19 VAND. L. REV. 1051 (1966).

It is urged that notice requirements are unreasonable since the buyer would not think to give notice to a party with whom he has had no dealings. Additionally, the consumer should not be expected to know of the business practice that requires notice of injuries or damages. A remote defendant, moreover, might not easily be located by the consumer. See, e.g., *Santor v. A and M Karagheusian, Inc.*, 44 N.J. 52, 56, 207 A.2d 305, 313 (1965); James, *Products Liability*, 34 TEX. L. REV. 192, 196-98 (1955); Prosser, *The Assault*, *supra* note 5, at 1130.

54. RESTATEMENT (SECOND) OF TORTS § 402A, Comment m (1965).

55. Prosser, *The Assault*, *supra* note 5, at 1133-34.

56. VA. CODE ANN. Titles 8.1-8.10 (Added Vol. 1965).

wrote of the difference between the U.C.C.'s strict warranty liability and the strict tort liability of 402A.⁵⁷ Dean Speidel additionally argued at that time that Virginia should limit any strict liability action to that defined under the U.C.C. He argued that the U.C.C. was preferable, for it offered broader product liability protection than that afforded by the then recently promulgated 402A.⁵⁸

Approximately fifteen years have passed since the publication of Dean Speidel's article. Today 402A's full expanse has been clarified by judicial interpretation. Clearly 402A affords fuller protection than that provided under the U.C.C.; moreover, 402A clearly affords solutions and a simplicity that the U.C.C. alone cannot achieve. Therefore today contrary to Dean Speidel's earlier suggestion,⁵⁹ both the strict warranty principles of the U.C.C. and the strict tort principles of 402A are needed in order to provide greater legal flexibility in the products liability field. Because flexibility is desired, 402A should be judicially embraced in Virginia. Legislative adoption, on the other hand, would likely serve only to restrict the scope of this strict tort doctrine.

In order to give support to the above recommendations, the hypothetical problem set out in the Speidel article will serve as a basis for study and comparison. Dean Speidel posed the problem as follows:

M, a medium-sized business concern, is engaged in the manufacture of rotary blades for power lawnmowers. The blades are produced in a modern plant and are designed to last through at least 200 hours of normal use. Most of *M*'s business is derived from special orders by favored customers. On January 5, *M* sold and delivered to *A*, a manufacturer of lawn and garden equipment, 250 specially manufactured rotary blades of various sizes. One of these blades contained an inherent structural weakness which was not discovered by *M* during routine pre-delivery testing. *A*, upon receiving the blades, conducted a visual examination of each and assembled them with other components into completed power mowers. Each finished mower was then subjected to and passed a thirty minute operating test. On February 1, *A* initiated a nationwide advertising campaign to promote the sale of its power mowers. About the same time, *A* sold 50 power mowers under its brand, including the mower with the defective blade, to *J*, a jobber. Without further inspection, *J* sold the defective mower in a lot of 15 to *R*, a large retailer of garden and lawn supplies who handled many different brands. *R* conducted a visual examination of each mower and performed prescribed maintenance without discovering anything unusual. On March 15, *R* sold the power lawnmower with the defective blade to *P*, a homeowner. *P* care-

57. Speidel, *supra* note 5, at 804.

58. *Id.* at 852.

59. *Id.* at 818.

fully followed the operator's manual prepared by A and put the lawnmower into use. On April 1, after 10 hours of normal operation, U, P's 16-year-old son, and B, a next door neighbor, attempted to start the mower to commence the weekly lawn mowing chore. Immediately after the lawnmower started, the rotary blade snapped and cut upwards with terrific force through the protective shield and into the gas tank. The resulting explosion destroyed the lawnmower and seriously injured both U and B.⁶⁰

A. Abrogation of Privity

Section 402A has been interpreted to provide the same broad range of personal injury protection as does Virginia's version of the U.C.C. Since Virginia's enactment of the anti-privity statute,⁶¹ all three plaintiffs in the hypothetical can recover. They can at least recover damages from the retailer R if they can show a warranty has been breached. Therefore, under Virginia's version of the U.C.C.,⁶² P can recover for his personal property

60. *Id.* at 808-09.

61. VA. CODE ANN. § 8-654.3 (Supp. 1964), which was originally placed in Title 8 concerning "Civil Remedies and Procedure," reversed Virginia's law that had required privity in certain breach of warranty cases. Before the enactment of this statute, no privity was required in a warranty action involving unwholesome food or beverage. It made no difference if the food was purchased in a sealed container. *Swift & Co. v. Wells*, 201 Va. 213, 221, 110 S.E.2d 203, 208-09 (1959). Public policy demanded that the health and life of consumers be protected. Additionally, the manufacturer-seller was considered better situated to prevent the distribution of such unwholesome products. *Swift* emphasized that defendant's advertising encouraged the public to buy, consume and serve these food products. See *Dickerson*, *supra* note 12, at 442; *Emroch*, *Statutory Elimination of Privity Requirement in Products Liability Cases*, 48 VA. L. REV. 982, 982-83 (1962). However, privity was a defense in nonfood or beverage warranty cases. In *Harris v. Hampton Roads Tractor & Equip. Co.*, 202 Va. 958, 121 S.E.2d 471, (1961), the plaintiff was injured by a defective crane sold to his employer by the defendant-dealer. Plaintiff's evidence was stricken since no privity existed between the defendant and him. *Id.* at 963, 121 S.E.2d at 474. See generally, *Comment*, 27 Mo. L. REV. 194 (1962). Virginia also had required privity in negligence actions, *General Bronze Corp. v. Kostopoulos*, 203 Va. 66, 69, 122 S.E.2d 548, 551 (1961), although Virginia had recognized that privity was not required if the product was "inherently" or "imminently" dangerous. *Id.* at 70, 122 S.E.2d at 551; *Robey v. Richmond Coca-Cola Bottling Works, Inc.*, 192 Va. 192, 196-97, 64 S.E.2d 723, 726 (1951). Another exception was carved out for negligence actions concerning food or beverage. In *Norfolk Coca-Cola Bottling Works, Inc. v. Krause*, 162 Va. 107, 113, 173 S.E. 497, 498 (1934), the defendant bottling company was held liable to plaintiff who suffered injuries after swallowing glass contained in a Coke bottle. See generally, *Emroch*, *Elimination of Privity*, *supra* note 61, at 982-84.

62. VA. CODE ANN. § 8-654.3 (Supp. 1964) was repealed and substituted without major change by VA. CODE ANN. § 8.2-318 (Added Vol. 1965) which states that:

Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer or seller of goods to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did not purchase the goods from the defendant, if the plaintiff was a person whom the manufacturer or seller might reasonably have expected to use, consume, or be affected by the goods

loss. *U*, the user, and *B*, the bystander, can recover for their personal injuries. Unlike the official U.C.C.,⁶³ Virginia's section 8.2-318 allows all three to recover since the manufacturer-seller should have reasonably foreseen that they all would somehow be affected by the product. Importantly, this anti-privy statute permits the bystander to recover since he could just as foreseeably be affected by defective goods.⁶⁴ As Dean Speidel emphasized, Virginia's section 8.2-318 was progressive; this statute afforded bystander protection without having to wait for case law to develop and afford comparable protection.⁶⁵ Except in a rare instance,⁶⁶ Virginia's U.C.C. reaches any defendant who made a warranty and is within the distributive chain.⁶⁷ Therefore Virginia has eliminated privity as a defense in a products liability action whether the action is brought in tort or warranty, implied or expressed.⁶⁸

63. U.C.C. § 2-318 (1952 version) did not abolish vertical privity. However, horizontal privity was abolished since this section extended its protection to the family, household or guest. Given the facts of the lawnmower hypothetical, the Official Text only allows *U* to sue and *R* to be sued. Speidel, *supra* note 5, at 815. However, Comment 3 emphasizes that "the section is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chains." U.C.C. § 2-318 (1972 version) suggests three alternative versions for state adoption.

64. Speidel, *supra* note 5, at 819-20.

65. *Id.* at 820, n.39.

66. VA. CODE ANN. § 8.2-318 (Added Vol. 1965) does not affect the architect. Any warranty made by the architect for his designs and his construction supervision runs only to his employer. *Gravely v. Providence Partnership*, 549 F.2d 958, 960 (4th Cir. 1977). When a statutory violation is involved, it is unnecessary to rely on Virginia's anti-privy statute. *Orthopedic Equipment Co. v. Eutsler*, 276 F.2d 455, 461 (4th Cir. 1960).

67. Consider that *M*, the manufacturer of the defective blade, either impliedly or expressly warranted the blade when selling it to *A*, the mower manufacturer. Then when the latter sold the assembled mowers to *J*, the jobber, the sale presumably transferred to the jobber the original warranty. When the jobber resold to *R*, the retailer, it seems reasonable that *M*'s warranty would again be transferred and that it was finally transferred by the retailer to *P*, the ultimate consumer. Then by reason of Virginia's version of § 2-318, the injured *U* and *R* can recover from the manufacturer of the defective blade. This approach certainly appears convoluted when compared with the relative ease of 402A.

68. However, it has been argued that privity should remain a defense in a U.C.C. warranty action. The action becomes "a hybrid form of action without a firm basis in either contract or tort law. This would prevent the uniformity of application which the Uniform Code tries to achieve." Comment, 26 WASH. & LEE L. REV. 143, 149, n.31 (1969). It is no more consistent that the bystander recover under warranty law. "The implied warranty is conceptually related to the contract of sales; therefore the bystander is beyond its scope—he is not the buyer of the product, nor is he within its chain of distribution, nor has he relied on any warranty." Comment, 38 U. CHI. L. REV., *supra* note 25, at 630. The extension is made no more logical by considering the bystander a third party beneficiary since the buyer-seller contract is not made with an outside party's benefit in mind. *Id.* at 631.

Dean Speidel had determined that *U*, the ultimate user, was protected under 402A;⁶⁹ clearly this section extends to "physical harm thereby caused to the ultimate user."⁷⁰ *U* can recover since 402A is based in tort and no contractual relationship is required between *U* and the defendants.⁷¹

However Dean Speidel questioned that *P*, the purchaser, either as an "ultimate consumer" or as a "bystander" could recover damages for his destroyed lawnmower.⁷² To reach this conclusion, however, the focus should have been that *P* wanted compensation for economic loss alone. Incorrectly Dean Speidel noted that "the *type* of damage sustained by *P* is under section 402A."⁷³ In actuality, defendant's liability under 402A "for physical harm thereby caused to the ultimate user or consumer, or to his property"⁷⁴ has rarely been interpreted to extend to economic loss of the product. Instead, 402A has typically been interpreted to allow recovery only for physical injury or for damage to property other than the product itself.⁷⁵ It is considered that the product's destruction alone does not give rise to an "unreasonably dangerous" defect. "[T]he term 'unreasonably dangerous,' as used in Section 402A as the basis for the imposition of strict liability, without proof of negligence, was not intended to be so 'watered down' as to extend to any defect which in any way may decrease the value of property."⁷⁶ This inability to recover for economic loss alone distinguishes tort and contract actions.⁷⁷ Therefore *P* is left to his contractual remedies, if any, in order to recover damages for the destroyed lawnmower. In Virginia he would rely on the breach of warranty sections of the U.C.C.⁷⁸

Dean Speidel determined that the bystander was unprotected under 402A.⁷⁹ However, approximately fifteen years after his article, it is clear

69. Speidel, *supra* note 5, at 819.

70. RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965).

71. RESTATEMENT (SECOND) OF TORTS § 402A, comment 1 (1965).

72. Speidel, *supra* note 5, at 819.

73. *Id.*

74. RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965).

75. See, e.g., *Anthony v. Kelsey-Hayes Co.*, 25 Cal. App. 3d 442, 447, 102 Cal. Rptr. 113, 116 (1972). *Contra*, *John R. Dubley Const., Inc. v. Drott Mfg. Co.*, 66 A.D. 368, 412 N.Y.S.2d 512, 513 (1979), wherein the only damage was to a crane purchased by the plaintiff from the manufacturer. See also, *Ford Motor Co. v. Lonon*, 217 Tenn. 400, 398 S.W.2d 240 (1966), where the court, in expanding 402A's coverage, relied on concepts of misrepresentation as enumerated in RESTATEMENT (SECOND) OF TORTS § 402B (1965).

76. *Brown v. Western Farmers Ass'n*, 268 Or. 470, 521 P.2d 537, 542 (1974).

77. See, e.g., *Alfred N. Koplín & Co. v. Chrysler Corp.*, 49 Ill. App. 3d 194, 364 N.E.2d 100, 103 (1977).

78. VA. CODE ANN. §§ 8.2-313 to 315 (Added Vol. 1965).

79. Speidel, *supra* note 5, at 819.

that judicial decisions have interpreted 402A to extend to the bystander.⁸⁰ Therefore the bystander, as suggested, need "not . . . wait for developing case law to obtain some legal protection."⁸¹ Today *B* can recover damages under 402A for personal injuries caused by the defective lawn mower.

B. *Negligence and Contributory Negligence*

Of course, under Virginia's U.C.C. and 402A alike, plaintiff need not prove the defendant negligent in order to recover.⁸² Historically in Virginia, negligence had not been an element in a breach of warranty action.⁸³ Obviously it is preferable for plaintiff to bring his suit in strict tort or warranty.⁸⁴ The obstacles⁸⁵ involved in a negligence action, for instance, are illustrated by *Logan v. Montgomery Ward & Co., Inc.*⁸⁶ In this exploding stove case, the inability to submit adequate proof of negligence prevented plaintiff's recovery. Because the allegedly defective stove was destroyed, expert testimony concerning a possible defect was lacking. Consequently, plaintiff could neither directly nor inferentially prove negligence. The explosion alone did not show negligence since intervening causes or third parties could have caused the defect. Since such an accident could have been attributable to other sources, the "doctrine of *res ipsa loquitur*" was of no assistance.⁸⁷

Dean Speidel maintained that contributory negligence or something

80. See notes 25-27, *supra*, and accompanying text.

81. Speidel, *supra* note 5, at 820.

82. Rapson, *supra* note 46, at 699. See generally, 63 AM. JUR. 2D *Products Liability* § 91 (1972).

83. Negligence is not an element in a breach of warranty action since, historically, warranty has been "consistently regarded as an action *ex contractu*." *Brockett v. Harrell Bros., Inc.*, 206 Va. 457, 463, 143 S.E.2d 897, 902 (1965). It made no difference whether the warranty was express or implied. *Gerst v. Jones & Co.*, 73 Va. (32 Gratt.) 518, 524 (1879). However, at one time in Virginia, plaintiff could not recover unless it was proven that defendant knowingly sold a defective product. *Belcher v. Goff Bros.*, 145 Va. 448, 456, 134 S.E. 588, 591 (1926). But under VA. CODE ANN. § 8.2-314, the outcome of *Belcher* should be changed; the fact that defendant did not know of the latent defect should not prevent the plaintiff's recovery. VA. CODE ANN. § 8.2-314, Virginia comment (1965).

84. See Emroch, *Pleading and Proof*, *supra* note 30, at 9.

85. "The principle obstacle to recovery, generally speaking, on a negligence theory, is not the substantive law as to duty or causation, but the unavailability of sufficient evidence of negligence to have the case submitted to the jury." Keton, *Products Liability—Proof of the Manufacturer's Negligence*, 49 VA. L. REV. 675, 676 (1963). See, e.g., Prosser, *The Assault*, *supra* note 5, at 1114-19.

86. 216 Va. 425, 219 S.E.2d 685 (1975).

87. *Id.* at 429, 219 S.E.2d at 689. *Pepsi-Cola Bottling Co., Inc. v. Yeatts*, 207 Va. 534, 538, 151 S.E.2d 400, 403 (1966); *Peters v. Lynchburg, etc., Light Co.*, 108 Va. 333, 336, 61 S.E. 745, 746 (1908). See generally, S. SPEISER, *THE NEGLIGENCE CASE: RES IPSA LOQUITUR* (1972).

that "resembles contributory negligence" is a defense under Virginia's version of the U.C.C.⁸⁸ Speidel held this to be true even after having asserted that negligence was not a prerequisite to recovery under the Code.⁸⁹ Therefore, according to Dean Speidel, 402A and the U.C.C. differ since under the Restatement, contributory negligence is no defense.⁹⁰ The difference is significant since a contributory negligence defense "give[s] the defendant more room to avoid strict liability."⁹¹

However, Dean Speidel was incorrect. The U.C.C. is silent as to the defense of contributory negligence.⁹² A closer analysis of the Speidel article illustrates only that the two actions are similar — under 402A and the Virginia U.C.C. both a defect and proximate cause must be proven.⁹³

Contributory negligence is no defense under Virginia's version of the U.C.C.⁹⁴ In *Brockett v. Harrel Bros. Inc.*,⁹⁵ an implied warranty of fitness action, the Virginia Supreme Court stated: "The majority view is that since the action is *ex contractu*, contributory negligence as a defense has no place therein We adopt the majority view since that is more in accord with our concept of the nature of the action."⁹⁶ However, the defense of assumption of risk, wherein the plaintiff is deemed to be the sole proximate cause of his own injury, can be raised in negligence, warranty and strict tort actions.⁹⁷ *Brockett* illustrates the difference between contributory negligence and assumption of risk. Mrs. Brockett was not barred from recovering for a broken tooth because she failed to discover "buckshot" embedded in the ham. Therefore failure to discover the danger or to take precautions against possible dangers does not preclude recovery. However, had she seen the "buckshot" in the ham but consumed it nevertheless, she would not have recovered since she would have been deemed

88. Speidel, *supra* note 5, at 833.

89. *Id.*

90. See note 35, *supra*, and accompanying text.

91. Speidel, *supra* note 5, at 834.

92. *Mattos, Inc. v. Hash*, 279 Md. 371, 368 A.2d 993, 999 (1977). Rapson, *supra* note 46, at 698-704.

93. Dean Speidel's references to section 2-715, comment 5 and section 2-314, comment 13, do not indicate that contributory negligence is a defense; these comments only emphasize plaintiff's need to prove proximate cause in order to recover for injuries resulting from a breach of warranty. Additionally, section 2-316(3)(b) does not support his argument since it addresses only the question of disclaimers of warranties. Speidel, *supra* note 5, at 833-34. See VA. CODE ANN. § 8.2-715, official comment 5; § 8.2-314, official comment 13; § 8.2-316(3)(b) (Added Vol. 1965).

94. *Matthews v. Ford Motor Co.*, 479 F.2d 399, 401, n.1 (4th Cir. 1973).

95. 206 Va. 457, 143 S.E.2d 897 (1965).

96. *Id.* at 462, 143 S.E.2d at 902.

97. Emroch, *Pleading and Proof*, *supra* note 30, at 9. See generally, Noel, *supra* note 39, at 93; Annot., 4 A.L.R.3d 501 (1965 & Supp. 1979).

to have assumed the risk. The court explained that "[t]his is so because the presumption is that the plaintiff contracted to buy the food product in its obvious or known condition."⁹⁸ Query: If *U* had observed gasoline gushing from the lawn mower and had lit a cigarette, would he be able to recover damages for his personal injuries caused by the ensuing explosion?

C. *Statute of Limitations*

Another area of consistency between section 402A and the U.C.C. in Virginia is the length of the period in which a personal injury suit may be brought. Until *Tyler v. Street*,⁹⁹ no court had had an opportunity to decide whether the controlling statute of limitations for a personal injury claim was the two-year statute governing actions arising in tort¹⁰⁰ or the four-year statute of the U.C.C.¹⁰¹

In *Tyler*, a suit based on diversity jurisdiction, the United States District Court for the Eastern District of Virginia based its decision on *Friedman v. Peoples Service Drug Stores, Inc.*,¹⁰² and held that the two year statute applies not only to tort actions but to every action for personal injuries whether based in contract or tort.¹⁰³ Since a cause of action arising in tort

98. 206 Va. at 463, 143 S.E.2d at 902. See Coleman, *The Morality of Strict Tort Liability*, 18 WM. & MARY L. REV. 259, 273, n.44 (1977); Curtis, *Contracts and Sale*, 53 VA. L. REV. 181, 187-88 (1967).

99. 322 F. Supp. 541 (E.D. Va. 1971).

100. VA. CODE ANN. § 8.01-243 (Repl. Vol. 1977) (amending VA. CODE ANN. § 8-24 (1954)) provides: "A. Unless otherwise provided by statute, every action for personal injuries, whatever the theory of recovery, except as provided in B [Every action for property shall be brought within five years hereof], shall be brought within two years next after the cause of action shall have accrued."

101. U.C.C § 2-725 provides in relevant part:

(1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

102. 208 Va. 700, 160 S.E.2d 563 (1968). In *Friedman*, an action arising before the effective date of the U.C.C., plaintiff sued for injuries sustained through defendant's alleged failure to properly fill plaintiff's prescription for medicine. Plaintiff admitted his action for personal injuries was barred in tort due to the running of the statutory period. He contended, alternately, that Virginia's three year statute of limitations for contracts should apply. The Virginia Supreme Court rejected plaintiff's contention and held that the two-year statute applies to every action for personal injuries, whether based upon tort or contract.

103. 322 F. Supp. 541, 543 (E.D. Va. 1971).

does not accrue until the time of injury,¹⁰⁴ rather than upon delivery of defective goods,¹⁰⁵ application of the two year limitation period facilitates consumer protection.¹⁰⁶

IV. WHY STRICT LIABILITIES IN TORT?

The rule stated in this Section [402A] is not governed by the provisions . . . of the Uniform Commercial Code, as to warranties; and it is not affected by the scope and content of warranties. . . . Nor is the consumer required to give notice to the seller of his injury. . . . The consumer's cause of action . . . is not affected by any disclaimer or other agreement. . . . It is much simpler to regard the liability here stated as merely one of strict liability in tort.¹⁰⁷

Although the U.C.C. provides considerable protection for the consumer injured by a defective product in Virginia, its "hybrid"¹⁰⁸ character presents problems which have no justifiable place in personal injury litigation. Dean Speidel recognized the existence of obstacles to warranty recovery for personal injury.¹⁰⁹ However, these obstacles are potentially more burdensome to the consumer-plaintiff than indicated by the "Case of the Exploding Lawnmower."¹¹⁰ The contractual limitations on warranty liability alone should be sufficient to usher the doctrine of strict liability in tort into Virginia.

After noting that the American Law Institute has unequivocally stated that the intricacies of sales law, such as notice and disclaimer of liability, are irrelevant in a personal injury suit,¹¹¹ Dean Speidel concludes that these obstacles pose no substantial threat to consumer protection under warranty theory.¹¹² This thesis was debatable at the time it was made, as demonstrated by the number of jurisdictions that adopted section 402A or some variation thereof.¹¹³ It finds much less justification today in view of

104. See *Caudill v. Wise Rambler, Inc.*, 210 Va. 11, 168 S.E.2d 257 (1969) (personal injury cause of action resulting from defective automobile accrued at time of injury and not at the alleged breach of warranty).

105. U.C.C. § 2-725(2).

106. This conclusion is not, of course, universally endorsed. See, e.g., 6 U. RICH. L. REV. 182, 188 (1971) where the author argues that the statute of limitations for contract is more desirable since the tort statute, in a breach of warranty action for personal injury, extends a seller's or manufacturer's potential period of liability for an indefinite length of time.

107. RESTATEMENT (SECOND) OF TORTS § 402A, Comment m (1965).

108. Prosser, *The Assault*, *supra* note 5, at 1126.

109. Speidel, *supra* note 5, at 834-38.

110. *Id.* at 808-09.

111. *Id.* at 834.

112. *Id.* at 834-38.

113. See *supra* note 16.

the growth and continued flexibility of the doctrine.

A. *Warranties of Quality*

Warranty theory in products liability is based upon the seller's guarantee, express or implied, that the product, if not misused, is of suitable quality for use.¹¹⁴ Originally under common law, a seller was bound only by express words of warranty with respect to quality.¹¹⁵ Gradually, during the early nineteenth century, implied warranties evolved and today they are codified in the U.C.C.¹¹⁶

The primary implied warranty is the implied warranty of merchantability provided by section 2-314.¹¹⁷ This warranty resembles section 402A and shares three basic requirements for recovery.¹¹⁸ Under both sections, a consumer-plaintiff must prove that the goods purchased from the merchant-defendant¹¹⁹ were defective,¹²⁰ thereby proximately causing injury to his person or property.

The other implied warranty available to the consumer is the implied

114. See, e.g., *Smith v. Hensley*, 202 Va. 700, 119 S.E.2d 332 (1961); *McNeir v. Greer-Hale Chinchilla Ranch*, 194 Va. 623, 74 S.E.2d 165 (1953); *Charles Syer & Co. v. Lester*, 116 Va. 541, 82 S.E. 122 (1914).

115. *Chandelor v. Lopus*, Cro. Jac. 4, 79 Eng. Rep. 3 (Exch. 1603).

116. U.C.C. §§ 2-314, 2-315.

117. U.C.C. § 2-314 provides:

- (1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.
- (2) Goods to be merchantable must be at least such as
 - (a) pass without objection in the trade under the contract description; and
 - (b) in the case of fungible goods, are of fair average quality within the description; and
 - (c) are fit for the ordinary purposes for which such goods are used; and
 - (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
 - (e) are adequately contained, packaged, and labeled as the agreement may require; and
 - (f) conform to the promises or affirmations of fact made on the container or label if any.

118. Speidel, *supra* note 5, at 825, n.53 and accompanying text.

119. U.C.C. § 2-314(1) provides that a warranty of merchantability will be implied, unless excluded or modified, "if the seller is a merchant."

RESTATEMENT (SECOND) OF TORTS § 402A(1)(a) (1965) provides that the section can be applied if "the seller is engaged in the business of selling such products."

120. Most commentators agree that § 2-314's "unmerchantable" standard and 402A's "unreasonably dangerous" standard for determining defectiveness are, for all practical purposes, equivalent.

warranty of fitness for a particular purpose.¹²¹ Although, in practice, it does not apply nearly as often as the implied warranty of merchantability,¹²² it has been important in recent cases involving Virginia plaintiffs.¹²³ When relying on this warranty, a plaintiff has the burden of proving reliance on the seller's expertise while selecting a product, and also that the seller had actual or constructive knowledge of the buyer's intended use of the product.¹²⁴

In addition to these implied warranties, the consumer also has the benefit of express warranties made by the seller which "relates to the goods and becomes a part of the basis of the bargain"¹²⁵ irrespective of the intention of the seller.¹²⁶ However, to be considered a valid express warranty, a statement must be more than the seller's recommendation or opinion of qual-

121. U.C.C. § 2-315 provides:

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

122. Clark & Davis, *supra* note 43, at 572.

123. See, e.g., Mathews v. Ford Motor Co., 479 F.2d 399 (4th Cir. 1973) (automobile unexpectedly shifting into reverse due to mechanical defect); Brockett v. Harrell Bros., Inc., 206 Va. 457, 143 S.E.2d 897 (1965) (buckshot embedded in a ham processed and packed by defendant).

124. U.C.C. § 2-315, *supra* note 121; U.C.C. § 2-315, Comment 1. See, e.g., Layne-Atlantic Co. v. Koppers Co., 214 Va. 467, 201 S.E.2d 609 (1974).

125. U.C.C. § 2-313 provides:

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

126. *Id.* Comment 3, § 2-313 states:

No specific intention to make a warranty is necessary if any of the factors is made part of the basis of the bargain. In actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement.

See Banks v. Continental Motors Corp., 251 F. Supp. 229 (E.D. Va.) *aff'd* 373 F.2d 314 (4th Cir. 1966).

ity.¹²⁷ On occasion, statements made after the close of the deal, upon delivery for example, may also be considered express warranties if the language can justifiably be regarded as part of the agreement.¹²⁸

Since 1962, a plaintiff in Virginia cannot be barred from successfully bringing an action against a manufacturer or seller of goods for breach of an express or implied warranty despite the absence of contract, provided the plaintiff might reasonably have been expected to "use, consume, or be affected by the goods."¹²⁹ The Virginia legislature thereby wielded the blow that breached the "citadel of privity"¹³⁰ and allowed a subpurchaser to sue the manufacturer of a product and the nonpurchaser to sue the retailer or manufacturer.¹³¹ Despite the fact that privity had been one of the most burdensome aspects of sales law transplanted to personal injury actions, others remain.¹³² In Virginia, an injured consumer must still run the gauntlet of notice, disclaimer and limitation of remedies as a prelude to recovery.

1. Notice

Uniform Commercial Code section 2-607(3)(a) provides: "Where a tender has been accepted . . . the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy."

Notice requirements, whether arising from section 2-607(3)(a), or from agreement of the parties, serve two basic purposes.¹³³ In addition to affording the seller an opportunity to remedy the defect voluntarily, thereby preventing needless litigation while minimizing damages, a notice requirement also allows the seller to prepare his defense by timely investigating the claim.¹³⁴

127. See, e.g., *Reese v. Bates*, 94 Va. 321, 330, 26 S.E. 865 (1897). If the seller assumes to assert a fact about which the buyer is ignorant, or makes a representation of quality which the buyer relies on as a warranty and is thereby induced to make the purchase, the seller is bound by it as a warranty regardless of intention.

128. U.C.C. § 2-313, Comment 7; see U.C.C. § 2-209.

129. VA. CODE ANN. § 8.2-318 (Added Vol. 1975) (formerly included as § 8-654.3).

130. *Ultramares Corp. v. Touche*, 255 N.Y. 170, 180, 174 N.E. 441, 445 (1931) (Cardozo, C.J.: "The assault upon the citadel of privity is proceeding these days apace.").

131. *Emroch*, *supra* note 1, at 985.

132. *Greeno v. Clark Equip. Co.*, 237 F. Supp. 427, 429 (N.D. Ind. 1965). "[T]he liability which [section 402A] would impose is hardly more than what exists under implied warranty when stripped of the contract doctrines of privity, disclaimer, requirements of notice of defect, and limitation through inconsistencies with express warranties."

133. *Project, Article Two Warranties In Commercial Transactions*, 64 CORNELL L. REV. 30, 265 (1978).

134. See also *Truslow & Fulle, Inc. v. Diamond Bottling Corp.*, 112 Conn. 181, 187, 151 A. 492, 495 (1930).

The drafters of the Code intended that notice requirements apply to retail as well as commercial consumers.¹³⁵ Consequently, it has been criticized as a "booby trap for the unwary"¹³⁶ and as a "tempest in a teapot"¹³⁷ when applied to a case involving personal injury. Although the Virginia Supreme Court has not had the opportunity to consider the ramifications of the Code requirement in the personal injury context,¹³⁸ potential problems, irrelevant to a tort-based action, do exist.

Although comment 4 to section 2-607 states that the notification requirement of the Code was not designed to bar a good faith consumer from his remedy, the language of the Code makes no such distinction.¹³⁹ Thus, until the court is called upon to determine whether the standard for the two groups will vary and, if so how, the requirement poses at least a potential problem.

One such problem presented by the scarcity of case law in the area concerns the consumer-plaintiff's responsibility to give notice to manufacturers and sellers throughout the production chain. Assume that it is *P*, the purchaser, who is injured when his lawnmower explodes and that he gives timely notice (whatever a court determines that to be on a case by case basis) to *M*, the manufacturer. If, at a later date, *P* decides to join *R*, the retailer, or *A*, the assembler, will his notice to *M* be sufficient to satisfy 2-607's requirements with respect to these parties? Conversely, if *P* initially chooses to sue *R* and later decides to join *M*, what result?¹⁴⁰

135. See, e.g., U.C.C. § 2-607, Comment 4 which states: "'A reasonable time' for notification from a retail consumer is to be judged by different standards [from those applicable to a commercial buyer]."

136. Prosser, *The Assault*, *supra* note 5, at 1130.

137. Clark & Davis, *supra* note 43, at 604.

138. Cf. *Jacot v. Grossman Seed & Supply Co.*, 115 Va. 90, 78 S.E. 646 (1913) (reasonable notice between commercial parties for defective product).

Other jurisdictions that have had the opportunity to consider the issue have held that the notice requirement of § 2-607(3)(a) does apply to personal injury suits. See, e.g., *Bennett v. United Auto Parts, Inc.*, 294 Ala. 300, 315 So. 2d 579 (1975); *Berry v. G. D. Searle & Co.*, 56 Ill. 2d 548, 309 N.E.2d 550 (1974); *Nugent v. Popular Markets, Inc.*, 353 Mass. 45, 228 N.E.2d 91 (1967); See also cases cited *infra* at note 141. But cf. *Wilson v. Modern Mobile Homes, Inc.*, 376 Mich. 342, 137 N.W.2d 144 (1965) (notice is not a prerequisite in warranty suits arising by legal implication distinction from contract of sale).

139. U.C.C. § 2-103(1)(a) defines buyer as "a person who buys or contracts to buy goods." Cf. *Wright v. Bank of California*, 276 Cal. App. 2d 485, 490, 81 Cal. Rptr. 11, 14 (1969) ("The plain language of the statute cannot be varied by reference to the comments").

140. See, e.g., *San Antonio v. Warwick Club Ginger Ale Co.*, 104 R.I. 700, 248 A.2d 778 (1968), where plaintiff severely cut her hand as she was attempting to open a soda bottle manufactured by "Warwick" and sold by "Boulevard." Written notice was given to Warwick four months after injury but Boulevard was not informed until eight months later and then only informally. The Supreme Court of Rhode Island assumed notice requirements applied

Although it is usually held that third party beneficiaries need not give notice as a prerequisite to maintaining suit for breach of implied warranty,¹⁴¹ the rule may seem anomalous to a plaintiff-purchaser who is barred by failure to comply with section 2-607(3)(a). Consider *Chaffin v. Atlanta Coca Cola Bottling Co.*¹⁴² where plaintiff's daughter had purchased a bottle of contaminated soda. When the plaintiff sued for personal injury caused by the soda, the court waived section 2-607(3)(a)'s notice requirements since the plaintiff had not purchased the soda. Had plaintiff's daughter been injured while sharing the soda, the court, impliedly, would have required that she timely notify the manufacturer or seller. This distinction seems at least as tenuous as the pre-Code privity distinction drawn in *Hazelton v. First National Stores, Inc.*,¹⁴³ where, although a housewife purchased and prepared meat infected with trichinae, neither she nor her children were entitled to sue for breach of implied warranty since it was held that she was acting as an agent for her husband who had paid the grocer.

2. Limitations on Warranty Liability

Although the Code provides for the creation of express¹⁴⁴ and implied¹⁴⁵ warranties, regardless of the intent of the seller,¹⁴⁶ and irrespective of the presence of a sales contract,¹⁴⁷ sellers can, and normally do, seek to protect themselves by excluding or limiting liability through carefully drafted contracts.¹⁴⁸

Section 2-316 prescribes the methods by which warranties, express or implied, can be excluded or modified. The very idea that sellers should be allowed to disclaim express warranties may seem unfair since, by defini-

in personal injury suits and held that "fairminded men could draw but one inference, namely that the notice given to Boulevard was not given within the reasonable time contemplated by § . . . 507(3)(a)." 248 A.2d at 782.

But cf. *Goldstein v. G.D. Searle & Co.*, 62 Ill. App. Ct. 344, 378 N.E.2d 1083, 1087 (1978), where the Appellate Court of Illinois stated, "the implied warranty of the manufacturer is tendered along with the goods to the ultimate consumer by his immediate seller, and notice to the immediate seller in the ordinary course of events enures to the benefit of the remote manufacturer."

141. *See, e.g.*, *Tomczuk v. Town of Cheshire*, 26 Conn. Sup. 219, 217 A.2d 71 (1965); *Frericks v. General Motors Corp.*, 278 Md. 304, 363 A.2d 460 (1976).

142. 127 Ga. App. 619, 194 S.E.2d 513 (1972).

143. 88 N.H. 409, 190 A. 280 (1937).

144. U.C.C. § 2-313.

145. U.C.C. §§ 2-314, 2-315.

146. U.C.C. § 2-313(2).

147. U.C.C. §§ 2-313, 2-314, 2-315.

148. Project, *Article Two Warranties*, *supra* note 21, at 170.

tion, they go to the "basis of the bargain."¹⁴⁹ However, 2-316(1) provides:

Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parole or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

The authors of the section reasoned that preference should be given to buyer's expectations resulting from an express warranty created by promise, description or sample over a "boilerplate" disclaimer.¹⁵⁰ If *M* had, for example, included a written warranty stating that the lawnmower was free from defects, he could not avoid liability by pointing to another clause in the sales contract that provided that the manufacturer would not be liable for repairs that became necessary due to defective parts.¹⁵¹ However, if *M* gave *P* a limited warranty for repair and replacement of defective parts, followed by a clause stating that "warranties herein are expressly IN LIEU of any other express or implied warranties of MERCHANTABILITY,"¹⁵² it is reasonable to construe the warranty and the disclaimer as consistent with each other and the limitation will be operative.¹⁵³

Since, at least presumably, conflicting express warranties and disclaimers rarely appear in sales forms,¹⁵⁴ other disclaimers are more pertinent for the purposes of this article. Section 2-316(1) offers additional protection to a seller through the use of the Code's parole evidence provision, section 2-202. This section recognizes the sales contract to be the total agreement of the parties, thus precluding the court's consideration of the warrantor's

149. J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE (1972).

150. U.C.C. § 2-316, Comment 1 states that the section "seeks to protect a buyer from unexpected and unbargained language of disclaimer by denying effect to such language when inconsistent with language of express warranty."

151. To be effective, such warranty would have to comport with the requirements of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, 15 U.S.C. § 2303 (1976). See text accompanying notes 188-219, *infra*.

152. Of course the requirements of § 2-316(2), including conspicuousness, must be met for effective exclusion of the implied warranties of merchantability and fitness.

153. Cf. *Walsh v. Ford Motor Co.*, 59 Misc. 2d 241, 298 N.Y.S.2d 538 (Sup. Ct. 1969) (express warranty clause very similar to the one presented in text). Although the court held the disclaimer invalid, White and Summers state that the disclaimer and warranty clauses do not conflict since the disclaimer only disclaimed warranties other than "[t]he warranties herein" and the contract did make some express warranties. WHITE & SUMMERS, *supra* note 149, at 353.

154. WHITE & SUMMERS, *supra* note 149 at 353. But cf. the cases collected in Project, *Article Two Warranties*, *supra* note 21, at 173-75 involving conflict of express warranties of limited duration.

prior oral promises.¹⁵⁵ If, in our hypothetical, *R* stated to *P* that the lawnmower he was about to purchase was warranted for all mechanical parts for one year, and thereafter *P* signed a sales contract which contained the usual merger clause language that all conditions and agreements were covered solely by that contract, 2-202 would operate to bar admission of the oral promise.¹⁵⁶ *P* may, however, introduce prior oral statements by *R* if they are consistent with the terms of the contract¹⁵⁷ or to clarify an ambiguity.¹⁵⁸ Thus, an enforceable oral warranty will be created only if it is consistent with the terms of the merger clause. The probable result of the interplay of sections 2-316 and 2-202 is an effective exclusion of any oral promises upon which *P* may have relied as part of the "basis of the bargain"¹⁵⁹ by reducing the warranty issue to an examination of the four corners of the agreement.

The Code also provides for the exclusion or modification of implied remedies. Section 2-316(2) provides:

Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantabili-

155. U.C.C. § 2-202 provides:

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

(a) by course of dealing or usage of trade [§ 1-205] or by course of performance [§ 2-208]; and

(b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

156. See, e.g., *Shore Line Properties, Inc. v. Deer-O-Paints & Chemicals, Ltd.*, 24 Ariz. App. 331, 538 P.2d 760 (1975), as cited in *Project, Article Two Warranties*, supra note 21, at 176, where the court rejected a buyer's contention that oral representations made by the seller were parole warranties under § 2-316(1) and therefore not inadmissible under § 2-202. The parole representations are not "words . . . relevant to the creation of an express warranty" within § 2-316(1). 538 P.2d at 763 (discussing ARIZ. REV. STAT. ANN. § 44-2333(A)(1956)).

157. See, e.g., *Green Chevrolet Co. v. Kemp*, 241 Ark. 62, 406 S.W.2d 142 (1966). But cf. *Bowen v. Young*, 507 S.W.2d 600 (Tex. Ct. App. 1974) (oral affirmations that a mobile home would conform to a sample admitted although the sales contract contained a blanket disclaimer).

158. A writing intended as the final agreement of the parties may be explained or supplemented "by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement." U.C.C. § 2-202(b).

159. *Moye, Exclusion and Modification of Warranty Under the U.C.C.—How to Succeed in Business Without Being Liable for Not Really Trying*, 46 DEN. L.J. 579, 594 (1969). *P* must also shoulder the burden to show consistency of disclaimer and warranty.

ty and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

As stated by the section, an exclusion or modification of the implied warranty of merchantability must mention merchantability in clear conspicuous language.¹⁶⁰ The section allows for additional methods of disclaimer of the warranty, notwithstanding section 2-316; it may be excluded or modified by expressions or language which, in "common understanding" calls the buyer's attention to the seller's intention to exclude,¹⁶¹ by examination of the goods or the refusal to do so by a buyer when such examination would have revealed defects,¹⁶² and by course of dealing, performance, or usage of trade.¹⁶³

The potentially inequitable consequences of allowing the "intricacies of sales law" to bar consumer recovery in a personal injury suit is well demonstrated by *Ford Motor Co. v. Moulton*.¹⁶⁴ Plaintiff, injured when his car suddenly veered to the right, jumped a guard rail and fell twenty-six feet to the street below, alleged that the accident occurred due to a defect in the steering mechanism. The court held that plaintiff's cause of action in negligence, strict liability in tort, and tortious misrepresentation based on defendant's advertisements, was barred by the statute of limitations. Thus, plaintiff was forced to rely solely on a warranty theory of recovery. The court ruled that Ford had disclaimed the implied warranties of merchantability and fitness in the manner required by section 2-316(2),¹⁶⁵ and, since the one-year or 12,000 mile express warranty had expired before the time of plaintiff's injury, the court concluded that he had no remedy at law.¹⁶⁶

Section 2-316(2) also provides for the exclusion or modification of the

160. The New York courts have held that the requirement for effective exclusion of merchantability by conspicuous language extends to limitations of remedy as well as warranty disclaimers. See, e.g., *Stream v. Sportscar Salon, Ltd.*, 91 Misc. 2d 99, 397 N.Y.S.2d 677 (Civ. Ct. N.Y. 1977).

161. U.C.C. § 2-316(3)(a) states that expressions such as "as is" or "with all faults" will be sufficient.

162. U.C.C. § 2-316(3)(b).

163. U.C.C. § 2-316(3)(c).

164. 511 S.W.2d 690 (Tenn. 1974).

165. *Id.* at 692.

166. Although plaintiff contended the exclusion of implied warranties was unconscionable, the court cited *Leff, Unconscionability and the Code — The Emperor's New Clause*, 115 U. Pa. L. Rev. 485 (1967), and stated that most commentaries answer this question in the negative. 511 S.W.2d at 693-94.

implied warranty of fitness. To exclude or modify this warranty, a warrantor need merely demonstrate his intention to disclaim by conspicuous general language.¹⁶⁷

Although 2-316 may provide adequate coverage for parties involved in commercial transactions, it does not afford sufficient protection for the retail consumer.¹⁶⁸ Often a consumer will be misled by the very appearance of a warranty since he may perceive it as a grant of rights rather than a limitation of liability.¹⁶⁹ Even when the consumer realizes the nature of a limited warranty combined with a disclaimer, he is rarely in a position to bargain with the warrantor since, as a practical matter, most consumer contracts are contracts of adhesion.¹⁷⁰ Due to this non-bargained-for aspect of retail consumer transactions, the provisions of 2-316 intended to protect consumers actually "become objective standards that alert sellers can easily meet thereby effectively maximizing the probability of successful insulation."¹⁷¹ Even when consumers may be in a position to bargain or shop around for a better deal, technical language such as that required for effective disclaimer by 2-316, may not bring across the full legal implications intended.¹⁷²

In an attempt to increase buyer protection, the draftsmen of the Code created a presumption that warranties are cumulative.¹⁷³ However, section 2-317 can, in effect, give warrantors an additional way of avoiding liability for a defective product. The section provides that when it is unreasonable to construe warranties, whether express or implied, as consistent and cumulative with one another, "the intention of the parties shall determine

167. U.C.C. § 2-316(2) provides that conspicuous language stating: "There are no warranties which extend beyond the description of the face hereof" is sufficient.

168. Clark & Davis, *supra* note 43, at 575-76.

169. H.R. REP. No. 1107, 93d Cong., 2d Sess. reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7702, 7706.

170. See Kessler, *Contracts of Adhesion — Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 631-32 (1943).

171. Clark & Davis, *supra* note 43, at 577.

172. Certainly, most persons buying goods in regular course from a professional merchant assume that the goods will suit *some* useful purpose and . . . will not subject him to unreasonable risk of harm. In the eyes of many consumers language such as "as is" or "with all faults" probably only suggest [sic] that the goods are not top quality, but hardly that the goods may have no usefulness at all and, in fact, may actually be harmful.

Shanker, *Strict Tort Theory of Products Liability and the Uniform Commercial Code: A Commentary on Jurisprudential Eclipses, Pigeonholes and Communication Barriers*, 17 W. RES. L. REV. 5, 41-42 (1965). See also *Reforming the Law*, *supra* note 5, at 1036.

173. "[A]ll warranties are made cumulative unless this construction of the contract is impossible or unreasonable." U.C.C. § 2-317, Comment 1.

which warranty is dominant."¹⁷⁴ However, if an inconsistency is present, it is presumed that the intention of the parties is such that: "Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose."¹⁷⁵ Because of this section, if *P* were given a limited express warranty regarding the lawnmower's expected performance, the implied warranty of merchantability might be automatically disclaimed regardless of the warrantor's compliance with the disclaimer provisions of section 2-316(2).¹⁷⁶

Once a warranty is effectively disclaimed, the seller is protected from the possibility of incurring liability under it. Similarly, section 2-317 allows a seller to limit his liability by providing that some warranties will be superior to others. Another method of limiting liability¹⁷⁷ available to the seller, is the Code's provision for limitation of remedies for enforceable warranties.¹⁷⁸

174. U.C.C. § 2-317.

175. U.C.C. § 2-317(c).

176. In *Marshall v. Murray Oldsmobile Co.*, 207 Va. 972, 154 S.E.2d 140 (1967) the Virginia Supreme Court upheld, on grounds of freedom of contract and public policy, the validity of a disclaimer of the implied warranty of fitness by an express warranty which stated that the limited express warranty was "in lieu of all other warranties, express or implied." However, because the case arose before the effective date of the U.C.C., the court did not consider whether the text of the exclusionary language of the warrantor's express warranty would be sufficient to exclude the implied warranty under the U.C.C.

Accord, *Desandolo v. F & C Tractor & Equipment Co.*, 211 So. 2d 576 (Fla. Dist. Ct. App. 1968), where the Fourth District Florida Court of Appeals expressly rejected *Henningsen v. Bloomfield Motors, Inc.* The court upheld a disclaimer of the warranties of merchantability and fitness in a written contract where the seller warranted a bulldozer to be free from defects in materials and workmanship and added that this warranty was in lieu of all other warranties, express and implied. The court reasoned that "extreme caution" should be exercised when asked to void a contract as contrary to public policy; contracts involving privity relationships should only be struck down on public policy grounds when it clearly appears "there has been some great prejudice to the dominant public interest sufficient to overthrow the fundamental public policy of the right to freedom of contract." *Id.* at 580 (quoting *Bituminous Cas. Corp. v. Williams*, 154 Fla. 137, 17 So.2d 98, 101 (1944)). See also *Construction Aggregates Corp. v. Hewitt-Robins, Inc.*, 404 F.2d 505, 510 (7th Cir. 1968), *cert. denied*, 395 U.S. 921 (1969). But see *Koellmer v. Chrysler Motors Corp.*, 6 Conn. Cir. 478, 276 A.2d 807 (1970).

177. U.C.C. § 2-316, Comment 2 provides: "This Article treats the limitation or avoidance of consequential damages as a matter of limiting remedies for breach, separate from the matter of creation of liability under a warranty. If no warranty exists, there is of course no problem of limiting remedies for breach of warranty."

178. U.C.C. § 2-719 provides:

(1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section [§ 2-718] on liquidation and limitation of damages,

(a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and

A consumer may recover consequential damages for "injury to person or property proximately resulting from any breach of warranty."¹⁷⁹ These damages may be limited or excluded¹⁸⁰ by the parties unless to do so would be unconscionable.¹⁸¹ The Code explicitly states that "[l]imitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable."¹⁸² Section 2-719(3) thereby presents the questionable but apparently intended¹⁸³ situation recognized by Dean Speidel.¹⁸⁴ If *R* or any other warrantor, in the absence of express warranty, attempted to *limit P's* potential consequential damages by so providing in the sales contract, this limitation would be avoidable since it is prima facie unconscionable. If however, a seller included in the contract a disclaimer of implied warranty which fully complied with section 2-316(2), the seller

repayment of the price or to repair and replacement of non-conforming goods or parts; and

(b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

179. U.C.C. § 2-715(2)(b).

180. U.C.C. § 2-719(3).

181. U.C.C. § 2-302 provides:

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

182. U.C.C. § 2-719(3).

183. U.C.C. § 2-719(3) provides: "Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. *Limitation* of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not." (emphasis added).

Use of the disjunctive with regard to the disclaimer of consequential damages, followed directly by the omission of "exclusion" with respect to damages for injury to the person, demonstrates a legislative intent to allow a seller to exclude, by contractual disclaimer, consequential damages for personal injury. This conclusion is further supported by § 2-719, Comment 3 which states: "The seller in *all* cases is free to disclaim warranties in the manner provided in Section 2-316." (emphasis added). Section 2-316, Comment 2 adds: "If no warranty exists, there is of course no problem of limiting remedies for breach of warranty."

184. Speidel, *supra* note 5, at 837-38.

would be protected from liability arising from the defective lawnmower.¹⁸⁵ It might also be noted that, in our borrowed hypothetical, it is possible for a seller to protect himself from liability to *B* and *U*. Although section 2-318 precludes the defense of lack of privity in an action against a manufacturer or seller of goods if the plaintiff was a person whom the manufacturer or seller might reasonably have expected to "use, consume, or be affected by the goods," the drafters of the section did not intend to prohibit the use of a disclaimer which complied with section 2-316.¹⁸⁶

B. *Magnuson-Moss Warranty Act*

The Magnuson-Moss Warranty Act,¹⁸⁷ which was enacted and became effective in 1975,¹⁸⁸ is the first federal attempt to affect transactions involving warranties.¹⁸⁹ It is intended to supplement rather than replace the Uniform Commercial Code.¹⁹⁰ Its stated purpose is "to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products,"¹⁹¹ thereby increasing competitive pressures and enhancing the quality of warranty offered by competitors.¹⁹² Although the Act is of potentially greater benefit to jurisdictions like Virginia that have not attempted to supplement the

185. Although many courts would employ § 2-302, the "unconscionability provision" of the Code, to avoid this harsh result, regardless of apparent legislative intent, at least one commentator finds this to be "incredible":

Here is 2-316 which sets forth clear, specific and anything but easy-to-meet standards for disclaiming warranties. It is a highly detailed section, the comments to which disclose full awareness of the problem at hand. It contains no reference of any kind to section 2-302, although nine other sections of article 2 contain such references. In such circumstances the usually bland assumptions that a disclaimer which meets the requirements of 2-316 might still be strikable as "unconscionable" under 2-302 seems explainable, if at all, as oversight, wishful thinking or (in a rare case) attempted sneakiness.

Leff, *supra* note 166, at 523 (footnotes omitted).

186. "To the extent that the contract of sale contains provisions under which warranties are excluded or modified, or remedies for breach are limited, such provisions are equally operative against beneficiaries of warranties under this section." U.C.C. § 2-318, Comment 1.

187. Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301-2312 (1976) (originally enacted as Act of Jan. 4, 1975, Pub. L. No. 93-637, § 101, 88 Stat. 2183 (1975)). [The statute will hereinafter be referred to as the Magnuson-Moss Act or as the Act].

188. 15 U.S.C. § 2312 (1976).

189. Eddy, *Effects of the Magnuson-Moss Act Upon Consumer Product Warranties*, 55 N.C. L. Rev. 835, 835 (1977).

190. 15 U.S.C. § 2311(b)(1) (1976) states: "Nothing in this chapter shall invalidate or restrict any right or remedy of any consumer under State law or any other Federal law."

191. *Id.* § 2302(a) (1976).

192. Eddy, *supra* note 190, at 861-62.

U.C.C. by means of additional state legislation,¹⁹³ its success, as viewed during the past four years, is questionable.¹⁹⁴

Under the provisions of the Act, a manufacturer or seller is not required to warrant his product.¹⁹⁵ The Act additionally provides that if he does so orally,¹⁹⁶ or if the product is not a "consumer product,"¹⁹⁷ the warranty does not fall within the scope of the Act. The congressional intent of the federal legislation is to improve the clarity of warranty terms through im-

193. See Clark & Davis, *supra* note 43, at 584-97. States such as Massachusetts, Maryland, West Virginia, and Kansas have enacted supplementary legislation which temper warranty disclaimers more effectively than the Magnuson-Moss Act.

194. The Act is based on the premise that, as a practical matter, suppliers of consumer goods vigorously use written express warranties as advertising and merchandising devices. *But see* Study, *An Empirical Study of the Magnuson-Moss Act*, 31 STAN. L. REV. 1117 (1979), which detailed the effect of the Act upon consumer product warranties and determined that there has been little shift toward improved protection since passage of the Act. The study compared forty-nine manufacturers offering various types of warranties for six consumer products before enactment of the Act with warranties proffered by those same manufacturers after the Act became effective. The author determined that 73% of the warrantors were using the same warranty they had previously used while 8% actually offered decreased consumer protection. At the same time 18% increased consumer protection with only three of the six products covered by full warranties. *Id.* at 1126-44.

195. 15 U.S.C. § 2302(b)(2) (1976).

196. *Id.* § 2302(a) defines the scope of the Act to include "any warrantor warranting a consumer product to a consumer by means of a *written warranty*." Section 2301(6) defines "written warranty" as "any written affirmation of fact or written promise made in connection with the sale of a consumer product . . . which relates to the nature of the material or workmanship . . . [or is a written promise] to refund, repair [or] replace . . . such product.

The point has been raised that this definitional section in the Act may actually increase the consumer's burden of proof since under U.C.C. § 2-313 a plaintiff need only show that the warrantor's promise became part of the "basis of the bargain." Denicola, *The Magnuson-Moss Warranty Act: Making Consumer Product Warranty a Federal Case*, 44 FORDHAM L. REV. 273, 275-76 (1975); Comment, 11 U. RICH. L. REV. 163, 166 (1976).

197. 15 U.S.C. § 2301(1) (1976) defines consumer product as "any tangible personal property which is distributed in commerce and which is *normally used* for personal, family, or household purposes (including any such property intended to be attached to or installed in any real property without regard to whether it is so attached or installed)." (emphasis added). The question of whether a product is "normally used" within the intent of the Act is to be answered independently of the actual use by a consumer. Products which are in fact used for business purposes are covered by the Act if they would generally be used for "personal, family or household purposes." Denicola, *supra* note 197, at 276. Thus an automobile — or a lawnmower for that matter — used in the operation of a business is still considered a "consumer product." *Id.*

Of course, the Act's focus on "consumer products" does not supplement state law in warranties involving business products. An employee injured due to a defect in the business machine his employer purchased from a manufacturer may recover workmen's compensation. However, any suit that he or his employer may bring for breach of warranty will be governed solely by state law.

proved disclosure¹⁹⁸ and to increase the substantive protection offered by warrantors by inducing compliance with "minimum federal standards for warranty."¹⁹⁹

198. 15 U.S.C. § 2303 (1976) requires that "warrantor[s] warranting a consumer product by means of a written warranty shall clearly and conspicuously designate such warranty" to be a "full" or "limited" warranty. Section 2302(a) provides that warranties designated as "full" shall "fully and conspicuously disclose in simple and readily understood language the terms and conditions of such warranty" including:

- (1) The clear identification of the names and addresses of the warrantors.
- (2) The identity of the party or parties to whom the warranty is extended.
- (3) The products or parts covered.
- (4) A statement of what the warrantor will do in the event of a defect, malfunction, or failure to conform with such written warranty — at whose expense—and for what period of time.
- (5) A statement of what the consumer must do and expenses he must bear.
- (6) Exceptions and exclusions from the terms of the warranty.
- (7) The step-by-step procedure which the consumer should take in order to obtain performance of any obligation under the warranty, including the identification of any person or class of persons authorized to perform the obligation set forth in the warranty.
- (8) Information respecting the availability of any informal dispute settlement procedure offered by the warrantor and a recital, where the warranty so provides, that the purchaser may be required to resort to such procedure before pursuing any legal remedies in the courts.
- (9) A brief, general description of the legal remedies available to the consumer.
- (10) The time at which the warrantor will perform any obligations under the warranty.
- (11) The period of time within which, after notice of a defect, malfunction, or failure to conform with the warranty, the warrantor will perform any obligations under the warranty.
- (12) The characteristics or properties of the products, or parts thereof, that are not covered by the warranty.
- (13) The elements of the warranty in words or phrases which would not mislead a reasonable, average consumer as to the nature or scope of the warranty.

199. *Id.* § 2304 reads, in part:

- (a) In order for a warrantor warranting a consumer product by means of a written warranty to meet the Federal minimum standards for warranty —
 - (1) such warrantor must as a minimum remedy such consumer product within a reasonable time and without charge, in the case of a defect, malfunction, or failure to conform with such written warranty;
 - (2) notwithstanding section 2308(b) of this title, such warrantor may not impose any limitation on the duration of any implied warranty on the product;
 - (3) such warrantor may not exclude or limit consequential damages for breach of any written or implied warranty on such product, unless such exclusion or limitation conspicuously appears on the face of the warranty; and
 - (4) if the product (or a component part thereof) contains a defect or malfunction after a reasonable number of attempts by the warrantor to remedy defects or malfunctions in such product, such warrantor must permit the consumer to elect either a refund for, or replacement without charge of, such product or part. . . . If

The repercussions of the Magnuson-Moss Act will be felt primarily, as intended,²⁰⁰ in sales involving warranties designated as "full." A warrantor offering a "full" warranty or service contract is no longer free to disclaim or limit the duration of the implied warranties.²⁰¹ Thus, Congress has effectively barred the use of a written full warranty combined with a disclaimer of implied warranties.

Despite this federal attempt to supplement consumer protection under U.C.C. warranty law, substantial deficiencies remain. Although a full warrantor may not presently disclaim implied warranties, he retains the power to substantially control remedies for their breach. Section 2-304(a)(3) states that a "full" warrantor "may not exclude or limit consequential damages for breach of any written or implied warranty on such product, *unless* such exclusion or limitation conspicuously appears on the face of the warranty."

Returning to our hypothetical, assume *P* was given the following conspicuous warranty appearing on the face of the sales contract:

Full Six Month Warranty—Remedy Limited to Repair or Replacement of Defective Parts within a reasonable time. This remedy is IN LIEU of any other express or implied warranties of MERCHANTABILITY and fitness.

Assume further that *P* then seeks consequential damages²⁰² for personal injury as well as for damage to his house. Under the Magnuson-Moss Act, we have the same problem arising from absence of parallel treatment of disclaimer and remedy limitation, as we do under the U.C.C. Although it has been argued that personal injuries could not be successfully excluded under section 2-715 since section 2-719(3) makes limitation of damages for personal injury *prima facie* unconscionable,²⁰³ this conclusion does not logically follow since complete exclusion of consequential damages for per-

the warrantor replaces a component part of a consumer product, such replacement shall include installing the part in the product without charge.

Subsection (b) additionally provides that the "warrantor shall not impose any duty other than notification upon any consumer as a condition of securing remedy of any consumer product which malfunctions, is defective, or does not conform to the written warranty." This provision may contribute to current reluctance to fully warrant consumer products. For example, warrantors may not be willing to incur potential expense for presentation of goods for repair at a distant service center. See Eddy, *supra* note 189, at 865.

200. See 120 CONG. REC. S21, 977 (daily ed. Dec. 18, 1974) (remarks of Sen. Magnuson). The competitive nature of the marketplace will induce warrantors to fully warrant their products.

201. 15 U.S.C. § 2308(a) (1976).

202. U.C.C. § 2-715(2) states: "Consequential damages resulting from the seller's breach include (b) injury to person or property proximately resulting from any breach of warranty."

203. See, e.g., Clark & Davis, *supra* note 43, at 612.

sonal injury appears to have been clearly intended by the authors of the U.C.C.²⁰⁴

Another interesting problem is presented by the Act. Suppose that *P* lends the troublesome lawnmower to *B*, and *B*'s house is destroyed when the lawnmower explodes. Although the warrantor's obligations upon a "full" warranty extend to "each person who is a consumer with respect to the consumer product,"²⁰⁵ section 2-301(3) defines "consumer" as a buyer of a consumer product and any other person who is entitled, by the terms of such warranty or under *state* law, to enforce warranty obligations against the warrantor. Although Virginia law would extend this protection to anyone expected to "use, consume, or be affected by the product,"²⁰⁶ the remedies available under the Act are expressly limited to "repair, replacement, or refund" of the defective product.²⁰⁷ If the warrantor has previously disclaimed consequential damages,²⁰⁸ *B* may be out of luck, though *P*, happily, can recover the replacement value of his lawnmower.

This, however, does not appear to be the primary weakness of the federal legislation. The Magnuson-Moss Act allows a warrantor choosing to offer a "limited" warranty to do so merely by stating that intention in simple, conspicuous language.²⁰⁹ The warranty, then, need only comply with the Act's disclosure requirements²¹⁰ and compliance with "federal minimum standards for warranties"²¹¹ will be waived. Due to this distinction, although implied warranties cannot be altogether disclaimed,²¹² they may be "limited in duration to the duration of a written warranty of reasonable duration, if the limitation is conscionable and is set forth in clear and unmistakable language and prominently displayed on the face of the warranty."²¹³ The *Henningsen*²¹⁴ dilemma remains. If *P* had been given a "limited" six-month warranty which complies with section 2308(b), the

204. Clark & Davis argue that in all probability the Federal Act uses the term "consequential damages" to mean "economic loss" and not personal injury. *Id.* The disparity presents yet another illustration of the potential dilemma awaiting consumers in a state that has chosen to adopt statutory routes of recovery that tend to "freeze" solutions to often complex and rapidly changing problems. *See also* Leff, *supra* note 166, at 516-23.

205. 15 U.S.C. § 2304(b)(4) (1976).

206. VA. CODE ANN. § 8.2-318 (Added Vol. 1965).

207. 15 U.S.C. § 2301(10) (1976).

208. *Id.* § 2304(a)(3).

209. *Id.* § 2302(a).

210. *Id.*

211. *Id.* § 2304.

212. *Id.* § 2308(a).

213. *Id.* § 2308(b).

214. *Henningson v. Bloomfield Motors, Inc.*, *see* note 22 *supra* (attempted contractual disclaimer of personal injury).

implied warranties otherwise available to him²¹⁵ would be pruned to a period coextensive with the express warranty,²¹⁶ *viz.* six months.

The Magnuson-Moss Act has been anything but an unqualified success in preventing consumer abuse.²¹⁷ Though it may eventually provide considerable consumer protection with respect to prevention of deception, and recovery of damages for a defective product, it does little to supplement warranty as the sole source of strict liability recovery for personal injury in Virginia.

C. *Judicial Management of Disclaimers*

Disclaimers are often not unreasonable in a commercial setting, particularly when the seller does not know the quality of his product and "the buyer is willing to take his chances."²¹⁸ This rationale does not transfer well, however, to the consumer new product sales sector.

Although courts generally uphold the doctrine of freedom of contract, rarely has a consumer "with a provable warranty claim . . . been denied full relief because of a disclaimer or other limitation."²¹⁹ Various commentators have examined judicial attempts to avoid unfair disclaimer.²²⁰

215. U.C.C. §§ 2-314, -315.

216. 15 U.S.C. § 2308(b) (1976). Section 2308(b) conflicts with U.C.C. § 2-725(1) which provides: "An action for breach of contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period to *not less than one year* but may not extend it." (emphasis added). Although 15 U.S.C. § 2311(b)(1) provides: "Nothing in this chapter shall invalidate or restrict any right or remedy of any consumer under State law," § 2-725(1) may not be controlling since the warranty could be entirely excluded under § 2-316.

217. See Study, *supra* note 194, at 1144-45 where the author of an empirical study of the accomplishments of the Magnuson-Moss Act concludes: "A simple tallying of the successes and failures of the Act might indicate that overall it has been a failure. Of the Act's three goals analyzed in this study—simplification, improved disclosure, and increased consumer protection—only improved disclosure has met with any substantial success." However, the author points out that the consumer may reap substantial benefit from increased and uniform disclosure under the Act. *Id.* at 1145. See also Clark & Davis, *supra* note 43, at 584-617 in which the authors conclude that Kansas, Maryland, Massachusetts and West Virginia have eradicated problems associated with §§ 2-316 and 2-719 more efficiently with supplemental warranty legislation at the state level than with the Magnuson-Moss Act.

218. Prosser, *The Fall*, *supra* note 3, at 831.

219. Clark & Davis, *supra* note 43, at 577-78. "The rationales employed by the judiciary to reach such results have ranged from the inarguable to the unbelievable. Indeed, since the result is usually preordained, a fair summary of disclaimer cases would be that getting there is all the fun." See also Leff, *supra* note 166.

220. One analysis reveals that courts have relied on three methods to avoid disclaimers or limitations they consider to be unfair: "(1) painful scrutiny of disclaimer and limitation clauses; (2) use of the U.C.C. prohibition against unconscionability; and (3) other very creative means." Clark & Davis, *supra* note 43, at 578. See also Moyle, *supra* note 159, at 613-18.

It would appear that, as a practical matter, most courts will try to provide compensation for the injured consumer with a bona fide cause of action, even if it means that the court must stretch to obtain such a result.²²¹ Warranty, as a device for strict liability recovery for personal injury, continues to carry "far too much luggage in the way of undesired complications,"²²² and leads the injured consumer "down a very thorny path"²²³ indeed.

D. *Judicial Consumer Protection*

The Virginia Supreme Court should adopt section 402A of the Restatement, or some variation thereof,²²⁴ the next time it is confronted with a

221. *Mathews v. Ford Motor Co.*, 479 F.2d 399 (4th Cir. 1973) demonstrates the lengths courts will go to avoid unfair warranty clauses. Mathews bought a car from one of Ford's dealers and was later injured because of a defect in the gear shift selector mechanism. The contract for sale included a limited express warranty from Ford, which expressly included its dealer, for replacement of defective parts within 24 months or 24,000 miles, whichever came first. A disclaimer followed stating: "This warranty is expressly IN LIEU of any other express or implied warranty including implied WARRANTY of MERCHANTABILITY or FITNESS." *Id.* at 401, n.3. The defendant-dealer argued on appeal that the express warranty excluded any liability for plaintiff's personal injuries. The Fourth Circuit affirmed defendant's liability since any attempt to limit responsibility for damages to repair or replacement of the defective parts was prima facie unconscionable under § 2-719(3). The court noted that the Virginia Supreme Court, in *Marshall v. Murray Oldsmobile, Inc.*, 207 Va. 972, 154 S.E.2d 140 (1967), had held that a disclaimer of implied warranties was not contrary to public policy. 479 F.2d at 403. It stated that defendant's reliance on *Murray* was unfounded since "*Murray* was a suit for rescission of contract, not for personal injuries." *Id.* at 403-04. A reading of *Murray*, however, clearly shows that the Virginia Supreme Court made no attempt to distinguish cases involving disclaimers of liability for defective products from those involving personal injuries. In fact, the court cited *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960) (Supreme Court of New Jersey held invalid a limited express warranty disclaiming implied warranties in a personal injury suit) and stated: "its questionable acceptance in other jurisdictions . . . fail[s] to convince us of the efficacy of following the action of the New Jersey court. We are loath to make such abrupt changes in settled law and reluctant to declare invalid the formal undertakings of parties for such vague reasons of public policy." 207 Va. at 977, 154 S.E.2d at 144. The court reasoned that if there existed "overriding reasons of public policy" for voiding a disclaimer, the legislature would have known of them in 1964 when it adopted § 8.2-316. *Id.* at 978, 154 S.E.2d at 145.

222. Prosser, *The Assault*, *supra* note 5, at 1133.

223. *Id.*

224. Most jurisdictions have opted for the flexibility available through judicial adoption of strict liability in tort. See, e.g., *Morningstar v. Black & Decker Manufacturing Co.*, ___ W. Va. ___, 253 S.E.2d 666 (1979) where the Supreme Court of Appeals of West Virginia rejected 402A's definition of a defective product as "unreasonably dangerous" to "the ordinary consumer who purchases it with the ordinary knowledge common to the community as to its characteristics," and adopted a test it determined to be more satisfactory. That test considers "whether the involved product is defective in the sense that it is not reasonably safe for

personal injury case in which strict liability in tort is pled as a theory of recovery.²²⁵ Although some commentators contend that any such adoption should occur legislatively,²²⁸ there is a strong argument in favor of judicial adoption.²²⁷

The law of responsibility for injuries generally has developed case by case. The courts have felt their way slowly because they have had to decide only one case at a time. They can "back and fill" where social conditions seem to be adversely affected by particular rules or variations. They create exceptions where the major rule creates anomaly. They very seldom move so fast that the economic result of a particular rule is chaos, even though the scare-mongers are always prone to make such predictions.²²⁸

One possible disadvantage of legislative adoption of 402A might be the "boxing-in" of the development of strict liability in tort in Virginia. The desired flexibility of the section would thereby be lost. Virginia's recent adoption of section 55-70.1 illustrates how restrictive such statutory adoption can be. This statute states that vendors impliedly warrant the habitability of new homes.²²⁹ Before the enactment of this legislation, the homeowner in Virginia had virtually no recourse against the vendor of a defectively constructed home. In 1977 alone, building permits for 63,564 homes were issued,²³⁰ but as late as August 1978, the Virginia Supreme Court held that an implied warranty of fitness for intended use was not extended to the sale of a new house.²³¹ As a result, in this consumer area,

its intended use" as determined by "what a reasonably prudent manufacturer's standards should have been at the time the product was made." *Id.* at 683.

See also *Barker v. Lull Engineering Co.*, 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978) (design defect) and *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972) (manufacturing defect) where the California Supreme Court rejected 402A's requirement that a plaintiff prove a product "unreasonably dangerous" as well as defective, and required proof of only a defective condition proximately causing injuries.

225. See Shanker, *A Case of Judicial Chutzpah (The Judicial Adoption of Strict Tort Products Liability Theory)*, 11 AKRON L. REV. 697 (1978) for a criticism of recent products liability cases; e.g. *Heatner v. Uniroyal, Inc.*, 63 N.J. 130, 305 A.2d 412 (1973); *Kirkland v. General Motors Corp.*, 521 P.2d 1353 (Okla. 1974) (both decided on unplead theories).

226. See, e.g., Shanker, *Strict Tort Theory of Products Liability and the Uniform Commercial Code: A Commentary on Jurisprudential Eclipses, Pigeonholes and Communication Barriers*, 17 W. RES. L. REV. 5 (1965); Titus, *supra* note 15; Note, *Reforming the Law*, *supra* note 5.

227. See, e.g., *Mendel v. Pittsburgh Plate Glass Co.*, 25 N.Y.2d 340, 253 N.E.2d 207, 305 N.Y.S.2d 490, 500 (1969) (Breitel, J., dissenting). See also Emroch, *Caveat Emptor*, *supra* note 1; Littlefield, *Some Thoughts on Products Liability Law: A Reply to Professor Shanker*, 18 W. RES. L. REV. 10 (1966).

228. Littlefield, *supra* note 227, at 22.

229. VA. CODE ANN. § 55-70.1 (Cum. Supp. 1979).

230. Comment, 13 U. RICH. L. REV., *supra* note 47, at 392, n.104.

231. *Bruce Farms, Inc. v. Coupe*, 219 Va. 287, 247 S.E.2d 400 (1978).

Virginia was ruled by the doctrine of "caveat emptor."²³² However, section 55-70.1 by no means offers extensive homeowner-consumer protection; its statutory language restricts liberal expansion of its scope. The statute, for instance, applies only to unoccupied, new dwellings or houses; leased dwellings are excluded from the statute's coverage. Additionally, under this statute, the warranty runs for only one year from the date of record title transfer or vendee's taking of possession. While it is the trend to extend 402A merely to mass-produced homes,²³³ some courts have interpreted 402A to afford more expansive coverage.²³⁴ Left to future judicial interpretation, 402A could provide great flexibility in this consumer area in Virginia. For instance the lessee, as well as the purchaser, of a home could be protected,²³⁵ and section 402A could conceivably be extended to include old dwellings as well as new.²³⁶

When Virginia enacted its "anti-privy" statute in 1962, its provisions were not intended to be locked into the U.C.C., thereby hampering personal injury suits with sales, contract and commercial trappings.²³⁷ Although the statute was, in part, a response to a determination by the Virginia Supreme Court that the privy defense should not be abrogated in cases involving nonfood products,²³⁸ there is little evidence that the legislature intended to preempt the products liability field with respect to personal injury actions by substituting the anti-privy statute verbatim for the official text of section 2-318²³⁹ of the U.C.C. This line of reasoning is consistent with the simultaneous adoption of section 1-103 which provides:

Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress,

232. *Id.*, 219 Va. at 289-90, 247 S.E.2d at 402-04. For an excellent study of the historical developments in Virginia real estate transactions, see Comment, 13 U. RICH. L. REV., *supra* note 47, at 381-92.

233. See note 46 *supra*.

234. See note 49 *supra*.

235. Section 402A has allowed recovery of damages by lessees of chattels. See, e.g., *Cintrone v. Hertz Truck Leasing & Rental Service*, 45 N.J. 434, 212 A.2d 769, 777-78 (1965). 402A could also be expanded to protect the lessee of real estate.

236. See note 50 *supra*.

237. Emroch, *Caveat Emptor*, *supra* note 1, at 166.

238. See *General Bronze Corp. v. Kostopulus*, 203 Va. 66, 70, 122 S.E.2d 548, 551 (1961); *Harris v. Hampton Roads Tractor & Equipment Co.*, 202 Va. 958, 963, 121 S.E.2d 471, 474 (1961).

239. Cf. *Titus*, *supra* note 15, at 767. The author contends that "[a]fter the Virginia legislature enacted the Code and repealed the antiprivty statute by which the special food warranty rule had been extended, one might very well conclude that the legislature intended the Code to provide the exclusive non-negligence products-liability remedy."

coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

Section 402A's critics do not seriously contend that strict liability has displaced the provisions of the Code since, the Code's only direct reference to tort liability expresses an intent of no ninterference.²⁴⁰ There are those who contend that 1-103 recognizes the availability of "principles of law and equity" merely to supplement the Code's provisions.²⁴¹ If this were, in fact, the case, the law of negligence and strict liability in consumer product personal injury suits would be "eclipsed."²⁴²

Although the question of whether the consumer personal injury field has been preempted by the U.C.C. has been answered in the affirmative by some commentators,²⁴³ most courts either ignore the argument²⁴⁴ or make no reference to it. Other courts have confronted the issue squarely, and have found that the Code and strict liability in tort are not incompatible. Judge Fuchsberg, concurring with the New York Court of Appeals in *Victorson v. Bock Laundry Machine Co.*²⁴⁵ stated that the "overwhelming judicial authority throughout the country and a fair reading of legislative purpose make clear that the better argument by far is that legislative preemption of strict liability in tort was not intended by the drafters of the code."²⁴⁶ As support for this proposition, he cited Dean Wade's account of the history of the Uniform Commercial Code.²⁴⁷ In 1941, the National Conference of Commissioners on Uniform State Laws in the Committee of the Whole, dropped section 16-B²⁴⁸ from the Revised Uniform Sales Act

240. U.C.C. § 2-318, Comment 2 states that the section seeks to loosen the privity requirement "without any derogation of any right or remedy resting on negligence."

241. Wade, *Is Section 402A of the Second Restatement of Torts Preempted by the U.C.C. and Therefore Unconstitutional?*, 42 TENN. L. REV. 123, 137 (1974).

242. Littlefield, *supra* note 229, at 31.

243. See, e.g., Dickerson, *Products Liability: Dean Wade and the Constitutionality of Section 402A*, 44 TENN. L. REV. 205 (1977); Shanker, *supra* note 227; Titus, *supra* note 15.

244. See, e.g., *Buttrick v. Arthur Lessard & Sons, Inc.*, 110 N.H. 36, 38, 260 A.2d 111, 112 (1969).

245. 37 N.Y.2d 395, 335 N.E.2d 275, 373 N.Y.S.2d 39 (1975).

246. 37 N.Y.2d at 407, 335 N.E.2d at 280-81, 373 N.Y.S.2d at 46.

247. *Id.* See Wade, *supra* note 243.

248. Wade, *supra* note 243, at 132-35 recounts 16-B's legislative history as follows: Professor Karl N. Llewellyn, selected to serve as draftsman for the revised Sales Act, prepared and published the second draft of the Uniform Sales Act in 1941. Section 16-B, a new provision of the Act, was intended to facilitate suits against manufacturers, without regard to privity, for marketing defective goods which could "foreseeably 'cause danger to person or property.'" *Id.* at 132. The draft of Section 16-B reads as follows:

Section 16-B. (New.) *Obligation to Consumer and to Dealer for Latent Dangerous Defect.*

(1) Where it can reasonably be foreseen that goods, if defective, will in their ordi-

before it was passed in Article 2 of the U.C.C.²⁴⁹ Although section 16-B was intended to preempt recovery in tort for breach of implied warranty, it was rejected on the ground that it would not be acceptable to state legislatures.²⁵⁰ "The drafters thus evinced their intent not to affect the independent development of tort law by having warranty and strict liability in tort impinge one on the other."²⁵¹ Judge Fuchsberg reached this conclusion due, in part, to Professor Karl Llewellyn's indication that the distinction to be drawn was between *tort* and commercial law, and not *negligence* and commercial law.²⁵²

nary use cause danger to person or property, the manufacturer of the goods, by selling them or delivering them under a contract to sell when such defect is not reasonably apparent, assumes responsibility as follows—

(a) To any legitimate user thereof whose title or authority to use derives from the manufacturer through the chain of merchandising of the goods as unused goods, who in the ordinary course of use or consumption is injured in person or property or otherwise by reason of the defect; and

(b) To any buyer or sub-buyer, under a contract to sell or a sale between merchants, who, through a warranty reasonably made or incurred in ignorance of the defect and in reliance on its absence, suffers damage due to such injury as is described in paragraph (a).

(2) The general purpose of this section is to make the remedy available directly against a person able to arrange both reduction and spread of the risk of dangerous defects, and also to make the remedy accessible to the person injured. "Manufacturer" within the meaning of the section therefore includes a person who processes or assembles or repacks goods which he thereafter markets for ultimate use in consumption, and includes a person who by brand, tradename, label, or otherwise assumes as against the user the position of a manufacturer or supervisor or sponsor of the manufacture. The liability also extends to any seller who delivers goods with knowledge of the dangerous defect.

(3) This section is not subject to negation or modification by contract, except that between merchants (and so far as is consistent with the warranty by operation of law in Section 14 and with the rules on modification of remedy in Section 57,) [sic] a merchant buyer may limit his own rights hereunder.

(4) This section neither states nor implies a policy with regard to goods which in their ordinary use, and without defect, are dangerous only to particular persons allergic or supersensitive to such goods.

249. When the draft was considered by the National Conference of Commissioners on Uniform State Laws in the Committee of the Whole, the point was raised that the state legislatures might be reluctant to pass the Code with Section 16-B. Professor Llewellyn's response was that when the legislatures refuse to act, courts do. Section 16-B was subsequently dropped before the Revised Uniform Sales Act became Article 2 of the U.C.C. The inference Professor Wade draws from the minutes of the Committee of the Whole is that Professor Llewellyn was seriously concerned that the state legislatures would not pass the Code with 16-B in it, and decided to settle for a much milder version of the provision which the legislatures would be willing to adopt. *Id.*

250. 37 N.Y.2d at 406, 335 N.E.2d at 281, 373 N.Y.S.2d at 47.

251. *Id.*

252. *Id.* at n.1.

The Supreme Court of Oregon confronted the preemption issue in *Mar-
kle v. Mulholland's, Inc.*²⁵³ The majority of the court held that the plain-
tiff's personal injury action arising from the blowout of a recapped tire
could be brought on a strict liability in tort theory since the warranty
provisions of the Code did not preempt the consumer personal injury
field.²⁵⁴ Noting that the intent of the legislature governs the question of
preemption, the court went on to state that, in the absence of legislative
history, courts are free to ascertain such intent:

It is our belief that the legislature would not have intended to pre-empt the
field and thus to prevent the development of case law for the additional
protection of consumers, particularly by way of a statutory scheme primarily
oriented to an entirely different field of law. . . . Where the results would
be regrettable . . . courts usually do not construe statutes in a manner that
would bring about such results in the absence of fairly specific language.²⁵⁵

Chief Justice O'Connell, specially concurring, voiced an objection to the
majority's determination of non-preemption.²⁵⁶ He "reluctantly" con-
cluded that the Code controlled all products liability cases involving
breach of implied warranty despite the fact that "the requirements of the
Code relating to notice and disclaimer do not make much sense in the
field of personal injury cases."²⁵⁷ The Chief Justice reasoned that since the
Code expressly deals with personal injury cases,²⁵⁸ section 1-103 cannot be
interpreted as giving a "court the license to create a separate body of
common law which covers substantially the same field and displaces the
Code's explicit provisions."²⁵⁹

Dean Wade recognized that the response from the courts²⁶⁰ to argu-
ments such as the one posed by Chief Justice O'Connell has not been
adequate.²⁶¹ He suggests that those who argue that the Code has pre-
empted the field, thus precluding the availability of strict liability in tort

253. 265 Or. 259, 509 P.2d 529 (1973).

254. *Id.* at 535.

255. *Id.*

256. *Id.* at 536.

257. *Id.*

258. The Chief Justice cites Oregon's statutory equivalent of U.C.C. §§ 2-715(2), 2-719(3),
2-318, and the official comments to §§ 2-318 and 2-607. *Id.* at 537.

259. *Id.*

260. *See, e.g.,* Caruth v. Mariani, 11 Ariz. App. 188, 463 P.2d 83, 87 (1970) (U.C.C. paral-
lels the doctrine of strict tort liability but they are "different breeds of cat"); Larson v. Clark
Equip. Co., 33 Colo. App. 277, 518 P.2d 308, 309 (1974) ("warranties provided by the UCC
are not the exclusive means of recovery without a showing of negligence or fault"); West v.
Caterpillar Tractor Co., 336 So. 2d 80, 88 (Fla. 1976) (presently, "there is no legislative
impediment to the adoption of this doctrine").

261. Wade, *supra* note 243, at 125.

for consumers injured by defective products, can be answered by viewing strict liability as negligence per se. Wade postulates that one solution would be for

the courts . . . to lay down "once and for all," a rule that it is negligence for a person who is engaged in the business of selling a product to sell it or put it on the market when it is in an unreasonably dangerous condition. This would be a part of the law of negligence and would in no way be impaired by the provisions of the U.C.C., and yet it would amount to strict liability in the sense that imposing liability for violation of the pure food statute amounts to strict liability.²⁶²

Thus, if the common-law adoption of strict liability is viewed as negligence per se, the cause of action is irrefutably tort-based and outside the preemptive sphere of the U.C.C.

The argument for preemption should not receive favorable reception when strict liability is considered by the Virginia Supreme Court. Two recent decisions by the courts of neighboring states counsel against preemption. The Court of Appeals of Maryland in *Phipps v. General Motors Corp.*²⁶³ expressly rejected the contention that the Maryland legislature intended to prevent further development of products liability law by the courts,²⁶⁴ and proceeded to adopt 402A of the Restatement (Second) of Torts. In so doing, the court cited approval of Wade's argument against preemption.²⁶⁵ *Phipps* is all the more persuasive since, in 1971, the Maryland legislature enacted a statute which rendered unenforceable any disclaimer of implied warranties or remedies for breach of warranty for consumer goods.²⁶⁶ Clearly, the Maryland court believed that the legislature, had it so intended, would have confined consumer-plaintiffs to a warranty

262. *Id.* at 139-40.

263. 278 Md. 337, 363 A.2d 955 (1976).

264. 363 A.2d at 962.

265. 363 A.2d at 963.

266. MD. COM. LAW CODE ANN. § 2-316.1 (1975) provides:

Limitation of exclusion or modification of warranties to consumers.

(1) The provisions of § 2-316 do not apply to sales of consumer goods, as defined by § 9-109, services, or both.

(2) Any oral or written language used by a seller of consumer goods and services, which attempts to exclude or modify any implied warranties of merchantability and fitness for a particular purpose or to exclude or modify the consumer's remedies for breach of those warranties, is unenforceable. However, the seller may recover from the manufacturer any damages resulting from breach of the implied warranty of merchantability or fitness for a particular purpose.

(3) Any oral or written language used by a manufacturer of consumer goods, which attempts to limit or modify a consumer's remedies for breach of the manufacturer's express warranties, is unenforceable, unless the manufacturer provides reasonable and expeditious means of performing the warranty obligations.

theory of recovery. In the interest of consumer protection, and in the absence of express intent, the court saw no need to "regrettably" hold that the field was preempted.

The Supreme Court of Appeals of West Virginia recently adopted strict liability in tort in *Morningstar v. Black & Decker Mfg. Co.*²⁶⁷ The court did not discuss parallel coverage by the Code of the products liability field,²⁶⁸ nor did it consider the possibility of preemption. Critics of strict liability may find this case especially confounding in view of the fact that the 1974 West Virginia Consumer Credit Act provided one of the best responses to objections concerning sales "intricacies" in consumer suits. The warranty provisions of the statute prohibit any exclusion, modification, or limitation of express and implied warranty and of all remedies for breach of warranty.²⁶⁹ They also provide that no action for breach of warranty or negligence with respect to consumer goods shall fail because of absence of privity between the consumer and the manufacturer or seller.²⁷⁰ Although "with one short chop the statute destroys the twin citadels of privity and disclaimer,"²⁷¹ the West Virginia court recognized that an action for damages arising from personal injury is more properly brought in tort.²⁷²

V. CONCLUSION

The Virginia consumer should be able to hold a manufacturer or seller

267. 253 S.E.2d 666 (W. Va. 1979).

268. *Id.* at 676 n.12.

269. W. VA. CODE § 46A-6-107. Disclaimer of warranties and remedies prohibited.

Notwithstanding any other provision of law to the contrary with respect to goods which are the subject of or are intended to become the subject of a consumer transaction, no merchant shall:

(1) Exclude, modify or otherwise attempt to limit any warranty, express or implied, including the warranties of merchantability and fitness for a particular purpose; or

(2) Exclude, modify or attempt to limit any remedy provided by law, including the measure of damages available, for a breach of warranty, express or implied.

Any such exclusion, modification or attempted limitation shall be void.

270. W. VA. CODE § 46A-6-108. Breach of warranty; privity abolished.

Notwithstanding any other provision of law to the contrary, no action by a consumer for breach of warranty or for negligence with respect to goods subject to a consumer transaction shall fail because of a lack of privity between the consumer and the party against whom the claim is made. An action against any person for breach of warranty or for negligence with respect to goods subject to a consumer transaction shall not of itself constitute a bar to the bringing of an action against another person.

271. Clark & Davis, *supra* note 43, at 594.

272. 253 S.E.2d 666, 678-84.

of a defective product which causes personal injury strictly liable in tort. It has been argued that section 402A of the Restatement (Second) of Torts effectively "eclipses" products liability causes of action under the U.C.C. since it precludes defenses such as notice, disclaimer, and modification of remedy. However, while courts must protect the parties' freedom of contract, no manufacturer or seller should be free to contractually avoid liability for injury caused by a defective product. The judiciary, furthermore, will not be intruding upon legislative authority if 402A is adopted as a theory of recovery in those cases involving personal injury or damage to property other than to the product itself.

